Supreme Court, U.S.
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No. 00-

IN THE

Supreme Court of the United States

JOSHUA W., ANITA O.,

Petitioners,

v.

USD 259 BOARD OF EDUCATION,
WICHITA PUBLIC SCHOOLS; *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

WHETHER AN ELIGIBLE KANSAS STUDENT MAY BE DENIED RESIDENCY IN A LOCAL KANSAS SCHOOL DISTRICT, AND, THUS BELONG TO NO SCHOOL DISTRICT IN THE STATE?

DOES A PARENT'S UNILATERAL PLACEMENT OF A SPECIAL EDUCATION STUDENT CONSTITUTE OBSTRUCTION AND MANIPULATION WHICH BAR REIMBURSEMENT UNDER *BURLINGTON* AND *CARTER*?

PARTIES TO THE PROCEEDING

Petitioners are Joshua W. and Anita O.

Respondents are the Board of Education of Wichita U.S.D. 259, Board of Education of Andover U.S.D. 385 and Commissioner Andy Tompkins and the Kansas State Board of Education.

There are no parent companies or non-wholly-owned subsidiaries.

TABLE OF CONTENTS

Page

Questions Presented i

Parties to the Proceeding ii

Table of Contents iii

Table of Cited Authorities v

Table of Appendices vi

Opinions Below 1

Statement of Jurisdiction 1

Constitutional and Statutory Provisions Involved 2

Statement of the Case 2

A. Decisions Below 2

B. Educational History 8

Reasons for Granting the Writ 14

I. The Decision Of The Court Of Appeals Conflicts With The Holdings Of This Court And With Federal Law And With The Holdings Of Other Courts Of Appeals, And If Left Undisturbed Would Deny A Class Of Eligible Disabled Students Their Rights To Educational Services Under The IDEA 14

II. Parent's Unilateral Placement Of A Special Education Student Does Not Constitute Obstruction And Manipulation And Bar Reimbursement Under *Burlington* And *Carter* . . . 21

III. The Questions Presented Are Important 23

Conclusion 25

TABLE OF CITED AUTHORITIES

Cases: *Page*

Board of Education of the Hendrick Hudson Central School District, Westchester County, et Al. V. Rowley, by Her Parents, Rowley et al., 458 U.S. 176 (1982) 23

Florence County School District Four v. Carter, 950 F.2d 156 (4th Cir. 1991), *affirmed*, 510 U.S. 7 (1993) 22

In re: Adoption of J.H.G., 254 Kan. 780, 869 P. 2d 640 (1994) 17

School Comm. of Burlington v. Department of Education of Massachusetts, 471 U.S. 359 (1985) 22

School District No. 16-R Umatilla County v. McCormmach, 238 Or. 51, 392 P. 2d 1019 (1964) 15

Union School District v. Smith, 15 F. 3d 1519 (9th Cir.), *cert. denied*, 513 U.S. 965 (1994) 14, 15

Vlandis v. Kline et al, 412 U.S. 441 (1973) 18

Statutes

20 U.S.C. § 1400 *et seq.* ..... passim
20 U.S.C. § 1415..... 5
28 U.S.C. § 1254 (1) 1
28 U.S.C. § 1331..... 1
28 U.S.C. § 1343 (a)(3) 1

Other Authorities:

Kan. Stat. Ann. § 72-1046. . . . . passim

TABLE OF APPENDICES

Page

Appendix A- Opinion Of The United States Court of Appeals For The Tenth Circuit Dated And Decided May 2, 2000. . . . . 1a

Appendix B- Order Of The United States District Court For The District Court For The District Of Kansas Dated And Entered On November 10, 1998. . . . . 13a

Appendix C- Judgment in a Civil Case Of The United States District Court For The District Court For The District Of Kansas Dated November 10, 1998. . . . . 18a

Appendix D- Memorandum And Order Of The United States District Court For The District Of Kansas Dated And Entered August 7, 1998. . . . . 20a

Appendix E- Memorandum And Order Of The United States District Court For The District Of Kansas Decided June 10, 1997 And Filed June 11, 1997. . . . . 34a

Appendix F- Memorandum And Order Of The United States District Court For The District Of Kansas Decided July 21, 1997 And Entered On July 22, 1997. . . . . 37a

Appendix G- Decision Of State Reviewing Officer Alderson Dated December 31, 1996. . . . . 46a

Appendix H- Decision Of Hearing Officer Tilford Dated And Filed On Or About October 13, 1996. . . . . 51a

Appendix I- Constitutional Provisions, Treaties, Statutes, Ordinances And Regulations Involved. 82a

Petitioners Joshua W. and Anita O., respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals for the Tenth Circuit is dated May 2, 2000 [*Joshua W. v. Board of Education*, 2000 U.S. App. Lexis 8837 (10th Cir. 2000)]. The District Court opinions the District of Kansas are dated November 10, 1998 (App. B); August 7, 1998 *Joshua W. et al., v. U.S.D. 259 et al.,* 13 F. Supp. 2(d) 1199 (App. C); June 10, 1997, *Joshua W. et al., v. U.S.D. 259 et al.,* 1997 U.S. Dist. LEXIS 9457 (D. Kan., 1997), (App. E); July 21, 1997 (App. F). The unpublished administrative decisions are dated December 31, 1996 (App. G); and October 13, 1996 (App. H).

STATEMENT OF JURISDICTION

The final judgment of the United States Court of Appeals for the Tenth Circuit affirming the decision of the District Court of Kansas was entered on May 2, 2000. Jurisdiction of the District Court was invoked pursuant to 28 U.S.C. § 1331 arising under the Individuals With Disabilities Education Act, 20 U.S.C. § 1400 *et seq.* and 28 U.S.C. § 1343 (a)(3) for violations of civil rights. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). Petitioners were granted until September 29, 2000 to file their petition for certiorari (Application No. 00A31). This petition for Certiorari is timely filed on September 29, 2000.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400 et seq., as well as Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 and 42 U.S.C. §1983, together with their implementing regulations. Pertinent parts of the statutes and regulations are found at Appendix I.

STATEMENT OF THE CASE

A. DECISIONS BELOW

Petitioners Joshua W. and his mother Anita O. seek a determination of which Kansas school district is responsible for Joshua's education and seeks reimbursement for a residential special education placement during the time when no school district in Kansas would accept him as a resident. There has been no hearing or trial on the merits with respect to an appropriate Individualized Education Program ("IEP") or services for Joshua because petitioners have been denied a finding on the threshold issue of which school district in Kansas is responsible for this Kansas student.

Petitioners filed a request for an administrative due process hearing on December 4, 1995, after Wichita U.S.D. 259 denied Anita O.'s request for residential placement and failed to develop an IEP for Joshua. Petitioners contended that the District had failed to provide appropriate special education services for Joshua, alleged IEP deficiencies and other violations of the child and parent benefits.

On January 16, 1996, the Wichita U.S.D. 259 contended that Joshua W. was not its responsibility and that Andover

U.S.D. 285 was responsible for Joshua because his divorced mother with whom he had not lived since 1986, lived in the Andover U.S.D. 385 school district. Joshua W.'s home was his grandmother's house in Wichita U.S.D. #259. On January 16, 1996, the Wichita U.S.D. 259 Supervisor of Hearings, Department of Special Education, advised Anita O. and the Hearing Officer, "Joshua W. could bring an action in State District Court or in Federal District Court against the Andover school district on the grounds that under Kansas law Andover is the district in which Joshua W. resides and on the grounds that Andover has failed to provide a free appropriate public education to Joshua W. It would not be necessary for Joshua W. to exhaust administrative remedies before bringing a lawsuit against the Andover school district since Andover has refused [] to allow an administrative proceeding to proceed." On February 1, 1996, petitioners also filed a request for a due process hearing against Andover U.S.D. 385 based on Wichita U.S.D.'s conclusion that Joshua was not Wichita's responsibility.

On February 2, 1996 Andover U.S.D. refused to process the hearing request, alleging that due process did not apply to Joshua and Anita O. On February 11, 1996, the Hearing Officer ruled that he had jurisdiction over the residency issue and that he would convene a due process hearing on the residency issue first, before addressing the substantive issues, as the resolution of residency was a pre-requisite to the issues of the educational services appropriate for Joshua. On February 22, 1996, petitioners informed the Hearing Officer that "Andover has refused to process the hearing request because they have determined that Joshua is not a resident of Andover but is the responsibility of W[ichita] P[ublic] S[chools]". Petitioners requested that the hearing officer "join Andover as a necessary party to these proceedings". The Hearing Officer refused Petitioners' motion to join Andover to

the proceeding on March 17, 1996 and again on May 28, 1996, stated that the only issue he would consider is "Joshua's residency as it pertains to whether the Wichita School district, U.S.D. 259, has responsibility for his education."

The hearing was scheduled for October 4, 1996 on the issues of residency and on October 30, 1996 on the substantive IDEA claims regarding the IEP and placement. On October 4, 1996, the hearing on residency was held, and on October 13, 1996, the Hearing Officer ruled that Joshua was not a resident of Wichita and that it was beyond the purpose of this hearing to determine who does have the responsibility for Joshua's education (App. H). The Hearing Officer failed to rule on Joshua's motion assert his rights and to be joined as a necessary party since he had turned 18 years old. The Hearing Officer also denied Petitioner's renewed motion to join Andover to the proceedings.

The Hearing Officer refused to convene a hearing on the issues raised in Petitioner's December 4, 1995 hearing request against Wichita and in their February 1, 1996 hearing request against Andover.

On November 8, 1996 Petitioners timely served their notice of appeal on the Commissioner of Education for the Kansas State Department of Education. In this notice of appeal, petitioners requested that the Commissioner "join Andover School District U.S.D. #385 as a necessary party to these proceedings. Both U.S.D. 259 and U.S.D. 385 deny that Joshua is a resident. Hearing requests were filed against both school districts. Andover U.S.D. 385 has denied Joshua a hearing." The Commissioner and State Department of Education did not respond.

On December 31, 1996, the Administrative Reviewing

Officer would consider only the issue of whether Joshua was a resident of Wichita U.S.D. 259. On November 20, 1995, he affirmed that was not, and again refused to name the school district in which Joshua resided for educational purposes (App. G).

Plaintiffs Joshua W. and Anita O. filed their complaint in federal district court on January 30, 1997 against the Wichita Public Schools U.S.D. 259, Andover U.S.D. 385, the Commissioner of Education and the state education agency, and others. Plaintiffs sought judicial review under IDEA of a decision of the Kansas Reviewing Officer affirming the Hearing Officer's decision, which had determined that Joshua W. was not a resident of Wichita U.S.D. 259 but failed to determine where he resided for purposes of the IDEA and failed to address all claims raised by plaintiffs. The complaint specifically requested that the District Court determine which Kansas school district is responsible for Joshua W. both before and after his 18th birthday, and further sought (a) a declaration that the Plaintiff's rights under the IDEA had been violated by the Defendants, (b) reimbursement for the costs of Joshua W.'s residential special education since November 1995, and (c) an award of costs, expenses and attorney fees under 20 U.S.C. § 1415. In addition, the complaint asserted claims for damages under § 504 of the Rehabilitation Code of 1973 and 42 U.S.C. § 1983.

On March 25, and 31, 1997, Wichita defendants answered the complaint. On April 4, 1997 Andover defendants filed a motion to dismiss and moved for sanctions against Plaintiffs for alleging that Joshua W. could be the responsibility of Andover U.S.D. 385 because his mother Anita O. resided in Andover U.S.D. 385. On June 11, 1997, the District Court granted Andover defendants' motion to dismiss but denied their motion for sanctions because Wichita U.S.D. 259, in fact, had

advised that Andover U.S.D. 385 was the school district responsible for Joshua (App. F). On June 24, 1997, Plaintiffs filed a motion for reconsideration of the order dismissing Andover U.S.D. 385 because Joshua's residency had to rest in either Andover U.S.D. 385 (as Wichita argued) or in Wichita U.S.D.259. Plaintiffs argued that if Andover were dismissed before a trial on the merits, and the court subsequently decided that Joshua was not a resident of Wichita, this disabled Kansan would have no Kansas school district responsible for his special education under IDEA. On July 21, 1997 the District Court denied Plaintiffs' motion and dismissed Andover U.S.D. 385 without a hearing (App. E).

On August 10, 1998, the District Court granted summary judgment in favor of Wichita U.S.D. 259 and Commissioner Tompkins, thus terminating the case without resolving the threshold issue of which school district in Kansas is responsible for providing educational services to Joshua W. during the relevant time period (App. D).

On September 9, 1998, Plaintiffs timely appealed to the Tenth Circuit, which appeal was delayed until March 5, 1999 when the District Court, at the initiation of the Tenth Circuit, enter certification pursuant to Rule 54 (b). On November 10, 1998, the district court dismissed the Kansas State Board of Education (App. B).

On May 2, 2000, the Tenth Circuit affirmed, without identifying Joshua's school district of residence (App. A).

The Tenth Circuit cited the Kansas residency law:

> Under Kansas law, residency with a parent who lives within the jurisdiction of the school district controls which school district is responsible for providing the

free appropriate public education:

> School residence; definitions. (a) Any child who has attained the age of eligibility for school attendance may attend school in the district in which the child lives if (1) the child lives with a resident of the district and the resident is the parent, or a person acting as parent, of the child; or (2) subject to the provisions of subsection (c) the child lives in the district as a result of placement therein by a district court or by the secretary of social and rehabilitation services; or (3) the child is a homeless child.

Kan. Stat. Ann. § 72-1046(a).

"[P]erson acting as parent" is defined, in relevant part, as follows:

> [A] person, other than a parent, who is liable by law to maintain, care for, or support the child, or who has actual care and control of the child and is contributing the major portion of the cost of support the child, or who has actual care and control of the child with the written consent of a person who has legal custody of the child, or who has been granted custody of the child by a court of competent jurisdiction.

Id. § 7201046(d)(2)(B).

Under the Kansas residency law and the circumstances of his home being at his grandmother's house with his adult sister in Wichita, Joshua could not be a resident of any school district in Kansas even though he was a resident of Kansas. While even homeless students in Wichita were entitled to educational services from Wichita, Joshua was denied residency. The Kansas residency law also allowed Andover to escape any responsibility, because although his mother lived in

the Andover school district, Joshua did not.

The Tenth Circuit also excused Wichita from developing an IEP for Joshua when its IEP expired in November 1995 because Anita O. sought residential placement.

B. EDUCATIONAL HISTORY

Joshua W. has been a resident of Kansas his entire school career. His parents divorced in 1980, and Joshua lived with his father from 1986 on. He was identified as seriously emotionally disturbed/behavior disordered in 1985. From 1991-1995 Joshua's teachers documented his deterioration and failure, his impulsivity, overactivity, distractibility and failure in the Wichita U.S.D. #259 school programs. For part of 8th and the first semester of 9th Grade, Anita O. funded Joshua's placement at a residential school, where he earned mostly B's and C's and was awarded credits in all courses. Thereafter, Wichita U.S.D. #259 placed him at Northwest High School where he failed, his behavior problems went unaddressed, and he failed his academic courses. In 1993, Joshua had failed his second year in Ninth grade in Wichita schools, and it was noted that Joshua was "in need of a highly structured, secured environment". Joshua attended various youth programs during this period because of his behavior problems in school and in the community.

Joshua's 1994-95 IEP recommended residential placement with extensive related services. This IEP was ignored by Wichita, which placed Joshua back at Northwest High School in fall 1994, where he continued to exhibit extremely serious behavior problems symptomatic of his disabilities. Wichita U.S.D. #259 took no steps to implement the residential IEP still in effect, but instead changed him to a part-day school program, noted that their Behavior Disorders

program "has not been appropriate as Josh is failing all classes", and then excluded him with no special education services. The Wichita staff stated that a more restrictive placement may be more appropriate for Joshua but failed to recommend one. The Wichita Psychologist, Patricia Cole, noted that Joshua performs well in very restrictive settings, that the Wichita programs had not met Joshua's needs and that a "more restrictive setting would be appropriate for Josh at this time". After exclusion, the District next recommended he attend his third year in 9th grade (actually he should have been in 11th grade) at Wichita's alternative school, where he failed all courses except "group dynamics". Joshua's problems in all settings, including the community escalated. In 1995, Joshua also had several psychiatric hospitalizations for suicide attempts, danger to self and others, as well as stays in detention, all for behaviors symptomatic of his disabilities. In July 1995, he was placed at Shadow Mountain psychiatric facility, which noted his pattern of failure in the Wichita schools and that he was expelled by Wichita on two occasions. In fall 1995, Anita O. then placed Joshua back in a boarding school. On the way to the school, Joshua threatened Anita O. and she filed charges against him. Anita O. placed Joshua at Kemper Military School.

Very quickly the Kemper principal recognized Joshua's disabilities and contacted Joshua's school district, Wichita U.S.D. 259, and spoke to both psychologist, Patricia Cole and to Sowers principal Bob Coleman and recommended the District place Joshua in a "residential special education program that is equipped and staffed to adequately address his emotional and behavioral needs". Anita O. was informed that school districts can pay for residential special education placements for disabled children and asked Wichita U.S.D. 259 to provide such a placement for Joshua. Joshua's residence was with his father since 1987 because of his severe emotional disabilities/behavior

disorder which manifests in maladaptive behaviors, including physical violence, in reaction to limit setting or any confrontations by authority figures, school officials and peers, including his mother. Anita O. has supported Joshua since 1987, and continued to do so while his residence was at his grandmother's house, with his adult sister, after his father moved out of the house at 144 South Sheridan in Wichita. Joshua's residence remained at 300 Winterset and 144 South Sheridan in Wichita U.S.D. 259 during this time period and not with Anita O. Anita O. contributed to maintain Joshua's residence at 144 South Sheridan. Joshua's father moved out of Joshua's grandmother's family house sometime in October 1995 and Joshua's adult sister then lived in the grandmother's house at 144 South Sheridan which remained Joshua's home. Joshua's residence for the past five years was listed in Wichita.

On Friday, November 17, 1995, Anita O. spoke with Wichita U.S.D. #259 staff and was told to enroll Joshua. She met with Wichita social worker and requested U.S.D. 259 provide Joshua residential placement at School District expense. The, Director of Kemper Military School, had already told U.S.D. 259 of Joshua's need for a residential special education placement. In September 1994, Joshua's last implemented IEP was the 1994-95 IEP for "public residential facility" based on "comprehensive evaluation, prior placement, teacher observations" and included extensive psychological counseling, social work services and other related services, which Wichita U.S.D. 259 failed to provide. In November 1995, District staff informed Anita O. that Joshua had already failed at all the District's placements. When the Wichita U.S.D. #259 social worker found out that Anita O. had placed Joshua at Three Springs, she testified that she "was glad [Joshua] was in a residential placement." On November 17 and 20, 1995, Anita O. gave the District significant information about Joshua W., and the District also had in its files extensive documentation of

Joshua's failure in all the District special education programs including Sowers. As early as October 1994, Wichita U.S.D. 259 had stated that it had no viable educational resource for Joshua in Wichita. U.S.D. 259 took none of the required steps to initiate an evaluation of Joshua, but only asked Anita O. to sign releases for the District to obtain records, which Anita O. signed.

Between November 17, 1995, when the U.S.D. 259 accepted Joshua as a resident, and January 12, 1996, when U.S.D. 259 dropped Joshua as a resident, the District convened no meetings to review any of Joshua's records, never made any decision on Anita O.'s request for residential placement, except to tell her how happy they were that she had secured residential placement for Joshua, did not even start the necessary paperwork to begin an evaluation of Joshua, and never requested that Anita O. return Joshua to the District for an evaluation. Instead, the District told Anita O. that Joshua could not make it at Wichita U.S.D. #259 and said prison would be best for Joshua, a stance adopted by U.S.D. 259 for years. The District failed to develop any IEP for Joshua on November 20, 1995.

Anita O. obtained private psychological evaluation of Joshua on November 30, 1995 and December 14, 1995 and provided it to U.S.D. 259, but U.S.D. 259 ignored the information.

Anita O. specifically informed the District of her change of address and fully informed the District that Joshua's home remained at 144 South Sheridan, with his adult sister, in his grandmother's house. The District failed to inform Anita O. of any concerns or problems with this living arrangement and District Director of Special Education Mark Hartke provided Anita O. information stating that in legal language, "lawful custodian" is defined as:

(1) Parent

(2) Guardian
(3) Adoptive parent
(4) Other person having legal custody of a child
(5) Step-parent
(6) Other person related to the child
(7) Person liable by law to maintain care for or support the child, or
(8) If non of the above is known or can be found, an agency shall cause proper proceedings to be instituted pursuant to the Kansas code for care of children to determine whether the child is in need of care.

Wichita U.S.D. #259 did not inform her of the necessity for "written consent". Joshua's adult sister met this criteria (6). The District failed to inform Anita O. of any concerns over Joshua's residency in U.S.D. 259 or that U.S.D. accepts out-of-district students and that parents can decide the students' residency. The District testified that the District never funds any out-of-state residential placements and never accepts non-resident special education students, only regular ed students. The District was made fully aware of Anita O.'s residence and Joshua's home with his sister in his grandmother's house at 144 South Sheridan on November 17, 1995 but took no action regarding Joshua's residency in U.S.D. 259 except to count him present in the District from November 20, 1995 through January 12, 1996.

On January 16, 1996 while the administrative proceedings were pending and "stay put" applied, Mark Hartke, U.S.D. 259 Director of Special Education, wrote to the Hearing Officer to inform the Hearing Officer of U.S.D. 259's unilateral decision that Joshua was Andover No. 385's responsibility and

that "the responsibility for all due process proceedings now shifts to the Andover School District".

Based on Wichita U.S.D. #259's statements, Anita O. filed a Hearing request against Andover to join Andover to the proceedings but Andover refused to process the request. Wichita U.S.D. #259 further stated on March 5, 1996 that U.S.D. 259 did not object to joining Andover No. 385 as a necessary party, and that Joshua did not need to exhaust administrative remedies but should sue Andover in Court because "Andover is the district in which Joshua W. [ ] resides and on the grounds that Andover has failed to provide a free appropriate public education to Joshua W. [ ]." Anita O. provided extensive information and records to Wichita on November 17, 1995, and November 20, 1995, including information about Joshua's legal problems, assault and threats, placement at Crawford County jail, Larned, Topeka State Hospital, Charter Hospital, Shadow Mountain Hospital, the State, the SRS, St. John's, Kemper, signed consent for Wichita to obtain records from Charter and Shadow Mountain and encouraged the District to talk to the professional staff at these Charter and Shadow Mountain regarding Joshua's need for residential placement. At the November 20, 1995 conference, the District did not provide Anita O. any written recommendations, did not prepare the required Notice of Intent to Evaluate, nor did the District provide Anita O. written notice of her IDEA rights. Anita O. specifically told Wichita U.S.D. 259 her address and that Joshua did not live with her. The District did not object, sent Anita O. notice that KSA 72-962 defined a "parent" as "other person related to the child", which fit Joshua's sister. Anita O. left no doubt on November 17 and 20, 1995 that she was requesting that Wichita U.S.D. 259 pay for residential placement for Joshua. Joshua turned 18 years old during the administrative proceedings, moved to be joined as a necessary party to the Hearing and filed an affidavit

establishing his residency in Wichita, all of which were ignored by the administrative officers and the courts.

REASONS FOR GRANTING THE WRIT

I.

THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH THE HOLDINGS OF THIS COURT AND WITH FEDERAL LAW AND WITH THE HOLDINGS OF OTHER COURTS OF APPEALS, AND, IF LEFT UNDISTURBED WOULD DENY A CLASS OF ELIGIBLE DISABLED STUDENTS THEIR RIGHTS TO EDUCATIONAL SERVICES UNDER THE IDEA

Unquestionably, Joshua resided in Wichita U.S.D. # 259 even though he may not have been physically present in the district at all times, or in November 1995. School residency statutes "in no way excuse a school district's responsibility to disabled children residing within the district who receive their free appropriate education in a placement outside the district." *Union School District v. Smith*, 15 F.3d 1519 (9th Cir. 1994). In addition, "no basis [exists] for holding that the determination of residency under IDEA or the [Kansas education statutes] should be different from the ordinary determination of residency." *Id.* (under "the ordinary measure of residency," child who, during the school week, resided at a location in Los Angeles outside plaintiff school district while attending a private counseling clinic, in which his parents placed him after district failed to offer a free appropriate education to child, remained a resident of the district while child attended the clinic). In other words, "residency for special education coverage purposes is measured by the normal standards." *Id.*

For school purposes, the term "residence" signifies the place where a child lives "with *some degree of* permanency." *School District No. 16-R Umatilla County v. McCormmach*, 238 Or. 51, 392 P.2d 1019 (1964) (emphasis added). Thus, just as temporarily maintaining a second residence in Los Angeles for the sole purpose of being able to commute daily to an appropriate residential educational program does not affect the child's permanent residence within a San Jose school district, *Union School District v. Smith*, 15 F.3d at 1525, temporarily attending a residential educational placement in another state, namely Tennessee, did not affect Joshua's permanent residence within Wichita U.S.D. 259.

The underlying opinions erroneously made perpetual or constant physical presence within Wichita U.S.D. 259 a condition of residency for special education coverage purposes. If this position were to be upheld, school districts who wanted to save money by placing severely disabled children in expensive residential placements could force parents, through inappropriate placements or inaction, to place them in out-of-state residential facilities and thereby shift the costs of the placements to other states and school districts where the facilities and the disabled child were physically present.

Moreover, the district court further erred in determining that Joshua was not living with, i.e., residing with, "a person acting as a parent." The Kansas school residency statute provides that "a person acting as a parent" means either a guardian or conservator or

> (B) a person, other than a parent, who [1] is liable by law to maintain, care for, or support the child,or [2] who has actual care and control of the child and is contributing the major portion of the cost of support of the child, or [3] *who has actual care and control of the child*

> *with the written consent of a person who has legal custody of the child*, or [4] who has been granted custody of the child by a court of competent jurisdiction[.]

K.S.A. § 72-1046(d)(B) (emphasis added). The district court reasoned that since Joshua's mother "continued throughout this period to act to support Joshua and to make decisions regarding his control and education," Joshua's older sister could not qualify as "a person acting as a parent" (App. D, Mem.& Order at 11).

In fact, the record is clear that "a person who has legal custody of" Joshua, namely his mother Anita O., has delegated the day-to-day "actual care and control" of Joshua to his older sister. The term "actual" means "real" or "substantial" as opposed to "theoretical, hypothetical, or nominal." Black's Law Dictionary 53 (4th ed. 1968). It makes no difference that Anita O. continued to "support" Joshua, nor that Anita O. retained the ultimate right "to make decisions regarding his control and education." The statute imposes no requirement that the delegee provide support to the child, nor that the legal custodian of the child relinquish *all* future control over the child. It requires only that a person with legal custody delegate "*actual* care and control", i.e., real and substantial as opposed to nominal control, to a person residing within the district.

Nor does it make any difference that the consent of Joshua's mother to his older sister's day-to-day control over Joshua was not put in writing. Under the doctrine of substantial compliance, it is sufficient that Joshua's mother has substantially complied with the requirements of K.S.A. § 72-1046(d)(B), by delegating real and substantial care and control of Joshua to his older sister. *Cf. In re Adoption of J.H.G.*, 254 Kan. 780, 869 P.2d 640 (1994) (applying the doctrine of

substantial compliance to statutory requirements for adoption). The absence of a written consent does not undermine the statute's purpose to limit "persons acting as parents" to those actually acting in loco parentis.

In sum, the district court erred in determining that Joshua must be physically present within the Wichita district in order to be entitled to receive special educational services from such district, and further erred in determining that Josha's older sister was not "a person acting as a parent" under K.S.A. § 72-1046(d)(B). Thus, the district court erred as a matter of law in granting summary judgment in favor of the Wichita defendants on the grounds that Joshua was not a resident of and therefore not entitled to special educational services from Wichita U.S.D. 259. Wichita U.S.D. 259 had not challenged Joshua's residency at any time until it was asked to pay for residential special education placement.

Moreover, the dismissal of Andover U.S.D. #385, the school district in which Anita O. resided, from the proceedings, following Andover's refusal to grant Anita O. a due process Hearing to determine her rights based on her unchallenged residency in Andover U.S.D. #385 left her son without a responsible Kansas school district. The United States Department of Education, Office of Special Education Programs ("OSEP") has held that the residency of a disabled student is generally that of his parent. Thus, Anita O. had every right to bring a Hearing against Andover to determine if the OSEP guidelines apply in this case. Her Hearing request has now been pending 4½ years.

The Hearing Officer, the Reviewing Officer, the District Court and the Tenth Circuit all erred because none would state unequivocally which school district in Kansas was responsible for the education of Joshua W. Throughout the underlying

proceedings, petitioners moved to join Andover U.S.D. #385 as a necessary party to the proceedings, but this request was repeatedly denied by the Hearing Officer, the Commissioner of Education, the Reviewing Officer and the District Court.

This Court has considered residency laws and found that:

> Permanent irrebuttable presumptions have long been disfavored under the Due Process Clauses of the Fifth and Fourteenth Amendments.

Vlandis v. Kline et al, 412 U.S. 441 (1973).

Moreover, in *Carrington v. Rash*, 380 U.S. 89 (1965), this Court held that a permanent irrebutable presumption of nonresidence violates the Equal Protection Clause of the Fourteenth Amendment. While Kansas might have an interest in establishing residency requirements for students, the State must ensure that *all* resident students in the State are provided educational services. The Kansas statute does not pass muster because it excludes students like Joshua from residency in *any* school district in the State, and thus denies him his rights under the Constitution and IDEA. In Joshua's case, the State had no established criteria for determining which school district was responsible for Joshua, only one for excluding him from residency in all school districts in Kansas[1].

Under the Kansas residency law, Joshua W. could never be a resident of Wichita U.S.D. #259 because he did not live there with a parent after his father left in October 1995. His home continued to be in his grandmother's house with his adult

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1 Indeed, Joshua could have qualified for residency in Wichita had he been homeless. Since his home was in Wichita in his grandmother's house, with his father until he moved out in October 1995, while his adult sister remained, he was forever prevented from residency in all school districts in Kansas as long as he maintained the same home.

sister without *written* consent of a parent as required by the Kansas residency law.

Likewise, Joshua W. could not be a resident of Andover U.S.D. #385 because, while his mother lived in the District, he did not, and in fact, had not lived with her since 1986.

Further, Joshua, as an 18 year-old, was denied residency in Wichita when he filed his affidavit of residency with the Hearing Officer and moved to be joined to the proceedings, but was ignored.

Thus, any eligible student in Kansas who lives with anyone without written permission from his parent, even when that person is a relative, is barred from receiving educational services in Kansas. The Kansas statute does not foster the State interest in providing educational services to all eligible students in the State but instead carves out an exception and operates to deny all services to a disabled student such as Joshua. Such an impact violates IDEA, which requires the State to provide special education and related services to all eligible students in the State, including to Joshua.

When the principal at Kemper Military School informed Anita O. that he had contacted the psychologist and principal in Wichita U.S.D. #259 in early fall 1995 to advise that Joshua required a residential *special education* program, she first became aware that *school districts* can place and fund eligible students in residential special education placements. She then promptly requested residential placement from Wichita U.S.D. #259. However, she had seen since 1985, when Joshua was first identified as seriously emotionally disturbed under the IDEA, that Wichita U.S.D. #259 would not provide any more that the exclusion or minimal programs in which Joshua failed for years. As of fall 1995, Joshua had spent 3 years in 9th grade

in Wichita U.S.D. #259, failing throughout the process.

Kansas residency law provides school districts a technical loophole for excluding Joshua and other similarly situated Kansas students from residency in a local school district. The IDEA, 20 U.S.C. §1400 *et seq.*, assures all disabled children a free appropriate public education ("FAPE"). States receiving funding under IDEA, Kansas in the instant case, must have in effect a policy and system for assuring all children with disabilities FAPE and must establish specific procedures for assuring compliance by both state and local school districts. 20 U.S.C. §1412. IDEA delegates supervisory authority to the State Education Agency, which is responsible for policies and procedures to ensure compliance with IDEA, including compliance with the requirement that all disabled students have an IEP in place and that all parents of disabled students (and disabled students at the age of majority) are afforded procedural safeguards, including due process Hearings. 20 U.S.C. §§1412, 1415.

There has yet to be a due process hearing or trial on the merits of Petitioners' IDEA claims, which were raised in the December 4, 1995 and February, 1996 Hearing requests filed against Wichita U.S.D. #259 and Andover U.S.D. #385, respectively, and then raised in Plaintiffs' complaint.

To date, there has been only one Hearing, on October 4, 1996, in which the Hearing Officer refused to determine Joshua's school district of residence.

For years, Wichita U.S.D. #259 used exclusion law enforcement in lieu of an appropriate IEP and services for Joshua, even when it had in its possession an IEP for 1994-95 *requiring* residential placement. Anita O. had unilaterally placed and paid for Joshua to attend private residential school

before 1995, when Wichita U.S.D. #259 refused to provide him appropriate services and used exclusion and incarceration as a substitute for the special education. Joshua is a student whose disabilities are so severe and complex as to require residential placement. States must include residential placements in the continuum of services as a condition of the State's receipt of federal IDEA funds[2]. The Kansas residency law as applied by the Hearing Officer, Reviewing Officer, the District Court and the Tenth Circuit violates petitioners' rights because it creates a permanent irrebuttable presumption of non-residence, and violates the Due Process Clause of the Fourteenth Amendment (See: *Vlandis v. Klein*, 412 U.S. at 455).

II.

PARENT'S UNILATERAL PLACEMENT OF A SPECIAL EDUCATION STUDENT DOES NOT CONSTITUTE OBSTRUCTION AND MANIPULATION AND BAR REIMBURSEMENT UNDER *BURLINGTON* AND *CARTER*.

Even though the underlying administrative and court decisions failed to determine where Joshua resided for school purposes, and although petitioners have been denied a Hearing and trial on their IDEA claims, the underlying opinions mischaracterize as "manipulative" parents who ask a school district for residential special education placement, and then make a unilateral placement when refused. Thus, the focus is on attacking petitioner for providing what the school districts knew for years was necessary to provide Joshua FAPE. All administrative Hearing Officers and the Courts have yet to

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2 IDEA even requires school districts to serve eligible students who are incarcerated, thus, any incarceration would not strip Joshua of his eligibility. Of course, Wichita U.S.D. #259 continuously used exclusion and failed to develop an appropriate IEP and services for Joshua.

determine Joshua's residency at the relevant time period. Petitioners' were told that this threshold question needed to be determined *before* their IDEA claims could be addressed. Now, five years later, Petitioners are still waiting for the residency determination.

In *Burlington* [*School Comm. of Burlington v. Department of Education of Massachusetts*, 471 U.S. 359 (1985)] and *Carter* [*Florence County School District Four v. Carter*, 950 F.2d 156 (4th Cir. 1991), *affirmed*, 510 U.S. 7 (1993)], this Court supported retroactive reimbursement in certain cases. Like petitioners here, the parents in those cases might be termed manipulative because they "manipulated" their children into appropriate special education programs when the school districts failed in their responsibilities. Here, Anita O. had long viewed Wichita's refusal to provide her son the intensive special education services he required and instead excluded him and contributed to his legal problems. She had placed and paid for residential school in 1993, when Wichita U.S.D. #259 failed to act. She had repeatedly paid for evaluations that Wichita U.S.D. #259 failed to conduct. When the Kemper principal told her he had contacted Wichita U.S.D. #259 early in the 1995-96 school year to advise them that Joshua required a residential special education placement, she first learned that a school district could pay for the services she had long paid for and she requested residential special education. That she acted unilaterally after Wichita U.S.D. #259 developed no IEP, no interim IEP, made no written recommendations and failed to generate any referral for a case study in November 1995, is to her credit, and was reasonable considering the pattern and practice of this school district. From the beginning of this case in 1995, she fully advised Wichita U.S.D. #259 of her address, of Joshua's psychiatric hospitalizations, of his legal issues and that he lived with his adult sister in Wichita. Only when she requested residential

placement at school district expense and asked for a Hearing did Joshua become a pariah, a resident of *no* school district in the state.

As of November 1995, Joshua had spent three years in 9th grade in Wichita U.S.D. #259 schools, all of which he failed. Once residency is established, Petitioners would easily have established that Joshua W. required residential placement. Petitioners were denied their right to pursue their IDEA claims through the Hearing process.

Under *Board of Education of the Hendrick Hudson Central School District, Westchester County, et Al. V. Rowley, by Her Parents, Rowley et al.*, 458 U.S. 176 (1982), FAPE is provided when a school district complies with all requirements of IDEA. The Court of Appeals acknowledges that there was no IEP developed for Joshua, that his Wichita IEP expired November 1995. It is also undisputed that Andover U.S.D. #385 refused Petitioners a Hearing, even when Wichita U.S.D. #259 advised that Andover U.S.D. #385 was responsible for Joshua. Further, it is undisputed that no Hearing was ever held on any of Petitioners' substantive claims because the threshold issue of residency is still unanswered.

IV.

THE QUESTIONS PRESENTED ARE IMPORTANT

The questions presented here have a significant impact on the education of children with disabilities who are denied residency because they may require residential placement.

First the opinions below ignored the question of which school district in Kansas is responsible for this Kansas student and never heard evidence on the substantive claims. It is

pointless to address residency piecemeal, in a vacuum, first applying the residency law to one district and then another, when the ultimate question of which school district in Kansas is Joshua's school district of residence is not ever addressed. The administrative Hearing Officers, the District Court and the Court of Appeals were all content to find that Joshua W., a life-long resident of Kansas, had no responsible school district of residence during the relevant time period. Such decisions have a profound effect on disabled students.

Second, the Tenth Circuit's finding that a parent is "manipulative" and barred from reimbursement for unilateral placement under *Burlington*, especially when that placement is made while the school districts are denying responsibility for her disabled son, is contrary to this Court's holding in *Burlington*. No hearing or trial had been held on any of petitioners substantive claims. The holdings are particularly harsh since petitioners were denied Hearings under IDEA, and because Wichita U.S.D. #259 had a long history of excluding this student and denying him services.

Finally, the Tenth Circuit holdings encourage incarceration as the "service provider of choice" for students with severe emotional disturbance who are difficult to manage yet are entitled to intensive special education and related services throughout their school career. Joshua had an IEP for residential placement in 1993, which Wichita U.S.D. #259 chose to ignore. Deflection of such students to the streets is not a viable or legal alternative to compliance with the requirements of IDEA. Such may allow school districts short-term financial benefit but fails to address the long-term cost to society and to the students themselves who are then ill-prepared to achieve the self-sufficiency contemplated by Congress when it enacted the IDEA.

CONCLUSION

For the reasons set out above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A-MEMORANDUM AND ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT, DATED AND ENTERED MAY 2, 2000

2000 U.S. App. LEXIS 8837

JOSHUA W., and ANITA O., Plaintiff-Appellants, v. USD 259 BOARD OF EDUCATION, Wichita Public Schools; LARRY VAUGHN; USD 385 ANDOVER, Board of Education; PATRICK TERRY; PAM CLAPP; GARY HARMON; REED HARRISON; CARLY HAYNES; NANCY KIRKENDOLL; NANCY LUSK; RICH STENSON; ANDY TOMPKINS, and KANSAS STATE BOARD OF EDUCATION, Defendants-Appellees.

No. 98-3248

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

2000 U.S. App. LEXIS 8837; 2000 Colo. J. C.A.R. 2392

May 2, 2000, Filed

JUDGES:
Before KELLY, HENRY, and MURPHY, Circuit Judges.

OPINIONBY:
Robert H. Henry

OPINION:

ORDER AND JUDGMENT[1]

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument.

I. Background

Plaintiffs Joshua W. and his mother Anita O. brought this action in 1997 under the Individuals with Disabilities Education Act (IDEA), *20 U.S.C. § § 1400* [*3] -1485, Section 504 of the Rehabilitation Act of 1973, *29 U.S.C. § § 701*-796, and *42 U.S.C. § 1983,* against defendants: the Andover Unified School District 385 (Andover USD), the individual members of the Andover USD's board of education and its superintendent, Terry Parker (Andover defendants); the Wichita Unified School District 259 (Wichita USD), individual members of the Wichita USD's board of education and its superintendent, Larry Vaughan (Wichita defendants); the Kansas Board of Education; and Dr. Andy Tompkins, the Commissioner of Education of Kansas. The district court dismissed the Andover defendants based on plaintiffs' failure to state a claim against them in their complaint. Thereafter, the district court granted summary judgment in favor of the Wichita defendants and Tompkins. The district court granted plaintiffs' request for

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[1] This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

Fed. R. Civ. P. 54(b) certification. We have jurisdiction under *28 U.S.C. § 1291,* and affirm both of the district court's decisions on review.

As an initial matter, we review briefly the IDEA and Kansas law as pertinent to disposition of this appeal. Under the IDEA, the federal [*4] government infuses states with funds "for the education of children with disabilities, guaranteeing disabled children between the ages of three and twenty-one access to a free, appropriate, public education (FAPE)." *Erickson v. Albuquerque Pub. Sch., 199 F.3d 1116, 1118 (10th Cir. 1999).* To receive federal funding, states must follow the IDEA's regulations, including identifying, locating, and evaluating "all children residing in the State who are disabled . . . and who are in need of special education and related services." *20 U.S.C. § 1412*(2)(C).[2]

The IDEA defines a "free appropriate public education" as "special education and related services" that:

(A) have been provided at public expense, under public supervision and direction, and without charge,

(B) meet the standards of the State educational agency,

(C) include an appropriate preschool, elementary, or secondary school education in the State involved, and

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[2] In 1997, Congress amended the IDEA significantly. See *Erickson, 199 F.3d at 1118 n.1.* (citing Pub. L. No. 105-17, 111 Stat. 37 (1997)). The time frame at issue here predates those amendments, which are not retroactive. See id. Accordingly, we quote and cite to the provisions of the IDEA in effect at that time. The substance of the provisions that are referenced in this order and judgment remain substantially the same as their counterparts in the IDEA's present form.

(D) are provided in conformity with the individualized education program required under section 1414(a)(5) of this title.

20 U.S.C. § 1401(a)(18). The individualized education program (IEP) required by the IDEA is prepared during a meeting with the child's teacher, a special education professional, and the child's parent(s). See *Erickson, 199 F.3d at 1118*. Among other things, the IEP reflects the child's abilities, special education goals, and the particular services the child will receive in furtherance of those goals. See id. The IEP must be reviewed at least annually and revised as necessary to ensure an appropriate education. See *20 U.S.C. § 1414*(a)(5).

Under Kansas law, residency with a parent who lives within [*6] the jurisdiction of the school district controls which school district is responsible for providing the free appropriate public education:

School residence; definitions. (a) Any child who has attained the age of eligibility for school attendance may attend school in the district in which the child lives if (1) the child lives with a resident of the district and the resident is the parent, or a person acting as parent, of the child; or (2) subject to the provisions of subsection (c), the child lives in the district as a result of placement therein by a district court or by the secretary of social and rehabilitation services; or (3) the child is a homeless child.

Kan. Stat. Ann. § 72-1046(a). "Person acting as parent" is defined, in relevant part, as follows:

[A] person, other than a parent, who is liable by law to maintain, care for, or support the child, or who has actual care and control of the child and is contributing the major

portion of the cost of support of the child, or who has actual care and control of the child with the written consent of a person who has legal custody of the child, or who has been granted custody of the child by a court of competent [*7] jurisdiction.

Id. § 72-1046(d)(2)(B).

Joshua W. was born in May 1978, and has been eligible for special education services under the IDEA since 1985. His natural parents, Anita O. and Bruce W., divorced in 1980, and custody was awarded to Anita O. In 1988, Joshua W. moved in with his father and, although Anita O. has continued to support him financially, he has not lived with her since. Joshua W. has also lived with his adult sister. Throughout the years, Joshua W. has attended many different schools, some financed under the IDEA and some financed privately by Anita O. Joshua W.'s education history, as well as his whereabouts (including confinements as a juvenile offender), are set forth at length in the district court's orders on review and will not be reiterated herein. See Appellant's App., Vol. I at 39-46; Appellant's App., Vol. IV at 863-78.

In November 1995, Anita O. asked the Wichita USD for a private residential special education placement for Joshua W. Her request was related to Joshua W.'s then-recent guilty plea in the District Court of Saline County, Kansas. The criminal charges that resulted in the plea arose from an altercation between Joshua W. and [*8] Anita O. while she was driving him to a military academy (he threatened her with a knife). Joshua W. plead guilty to aggravated assault in September 1995 and was sentenced by the court on November 20, 1995. As part of Joshua W.'s sentence, the court ordered him to serve twenty-four months probation. Probation was conditioned on his entering and successfully completing Three Springs, a residential private facility

located in Tennessee. Anita O.'s efforts to "enroll" Joshua W. in the Wichita USD took place at the same time she was actively seeking his placement in Three Springs in order to avoid his incarceration.

The Wichita USD denied Anita O.'s request for private residential placement. Despite the denial, she placed Joshua W. in Three Springs. Although the Wichita USD had prepared an IEP for Joshua W., which was in effect from November 1994 to November 1995, it was not able to prepare an IEP for Joshua W. for the following year in conjunction with Anita O.'s request for residential placement. Essentially, Anita O.'s unilateral placement obstructed the IEP process. Moreover, she failed to inform the Wichita USD of the circumstances underlying her request for the placement.

Anita [*9] O. then pursued administrative remedies available under the IDEA by requesting an impartial due process hearing, see *20 U.S.C. § 1415*(b)(2), and unsuccessfully sought that the Andover USD be joined as a party to that hearing. An evidentiary hearing was held on October 4, 1996. The limited issue before the hearing officer was whether the Wichita USD was responsible for Joshua W.'s special education. The hearing officer found that Joshua W. was not a resident of the Wichita USD in November 1995 under applicable Kansas law. See Appellant's App., Vol. I at 156-58. Specifically, the hearing officer found that Joshua W. ceased to be a resident of the Wichita USD when his father--the resident parent--moved out of that district[3]. See id at 157. On plaintiffs' appeal, a due process reviewing officer affirmed the hearing officer's decision. See id. at 159-63.
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[3] n2 Anita O. moved out of the Wichita USD and into the Andover USD in March 1995. See Appellant's App., Vol. I at 157.

Despite plaintiffs' attack on the appropriateness and adequacy of Joshua W.'s entire special education experience, the focus of this litigation is limited to whether either the Andover or Wichita USD is responsible for paying for Joshua W.'s residential private placement commencing in November 1995. On appeal, plaintiffs contend that the district court erred by: (1) dismissing the Andover USD because it is a necessary/indispensable party; (2) dismissing the "alternative" IDEA claims against the Andover defendants; (3) granting summary judgment to the Wichita defendants; (4) dismissing the Rehabilitation Act and § 1983 claims arising out of the Wichita USD's purported violation of the IDEA; (5) granting summary judgment to Tompkins; and (6) dismissing the Kansas State Board of Education for failing to serve process under Fed. R. Civ. P. 4(m).

II. The Andover Defendants

We turn first to the district court's decision dismissing the Andover defendants on a motion to dismiss. We review de novo the sufficiency of a complaint and the district court's grant of a Fed. R. Civ. P. 12(b)(6) motion to dismiss. See *GFF Corp. v. Associated Wholesale Grocers, Inc., 130 F.3d 1381, 1384 (10th Cir. 1997).* [*11] In doing so, we apply the same standards applied by the district court. See *David v. City & County of Denver, 101 F.3d 1344, 1352 (10th Cir. 1996).* Specifically, we accept as true all the well-pleaded factual allegations in the complaint as viewed in the light most favorable to the nonmoving party. See *GFF, 130 F.3d at 1384.* Moreover, "[a] 12(b)(6) motion should not be granted unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Id. (quotation omitted). Accordingly, we assess the limited question "whether the plaintiff's complaint alone is legally sufficient to state a claim for which relief may be granted." *Miller v. Glanz, 948 F.2d 1562, 1565 (10th Cir. 1991).*

Plaintiffs acknowledge that they failed to raise the issue of indispensable party below in defending against the Andover defendants' motion to dismiss, but argue that we should consider it nevertheless because we have an independent duty and should exercise our jurisdiction to do so. Essentially, plaintiffs argue that, without the Andover USD, it will be impossible to ascertain which school [*12] district is responsible for providing Joshua W. with special education and special services. Plaintiffs argue that, although by their own admission Joshua W. never resided in the Andover USD, the Wichita USD adopted the position that he did. Last, plaintiffs argue that the district court improperly based the dismissal on paragraph three of the complaint (which states that Joshua W. never resided in the Andover school district), and should have, under Fed. R. Civ. P. 8(e)(2), allowed the claims against all the Andover defendants to proceed.

Plaintiffs' attempt to argue joinder of a necessary/indispensable party under Fed. R. Civ. P. 19 obfuscates the real issue, i.e., whether the district court properly dismissed the Andover USD for plaintiffs' failure to state a claim in their complaint. Even if we were persuaded of Rule 19's applicability, and our "duty" to consider the issue of a necessary party on appeal in these circumstances, we would conclude that the Andover USD is neither a necessary nor indispensable party for purposes of that rule. See Fed. R. Civ. P. 19 (setting out factors to be considered in relevant analyses).

Based on our review of the complaint under the standards [*13] set forth above, we conclude as did the district court. Plaintiffs' complaint states that Joshua W. "has resided all his life in the Kansas school district of Wichita U.S.D. 259."

Appellant's App., Vol. I at 21, para. 3 (complaint)[4]; see also id. at 23, para. 18 ("Since 1988, Joshua W. lived in Wichita with various family members, including his father or adult sister but never with his mother."). Under the applicable Kansas law quoted above, Joshua W.'s residency controls. Plaintiffs have failed to plead any residency in the Andover USD. Neither are we persuaded by plaintiffs' contentions on appeal of "alternative" claims against the Andover defendants, in which plaintiffs essentially argue that: (1) the Wichita USD took the position that the Andover USD was responsible for Joshua W.'s special education needs; and (2) if Wichita is not responsible for meeting Joshua W.'s special education needs, the Andover USD had to be the responsible district. Although plaintiffs characterize this an alternative pleading permitted under Fed. R. Civ. P. 8(e)(2)--which condones inconsistent claims and defenses--that rule does not apply to this situation.

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III. The Wichita Defendants and Tompkins

Next, we review the district court's grant of summary judgment to the Wichita defendants and Tompkins. Generally, summary judgment is appropriately granted if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c).

In reviewing a challenge under the IDEA, the district court engages in a modified de novo review, in which it must independently review the evidence contained in the administrative record, accept and review additional evidence, if necessary, and make a decision based on the

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[4] After the district court entered its order dismissing the Andover defendants, plaintiffs amended their complaint. The amended complaint still contains the same statement. See Appellant's App., Vol. II at 271, para. 3 (amended complaint).

preponderance of the evidence, while giving 'due weight' to the administrative proceedings below.

Erickson, 199 F.3d at 1120 (quotation omitted). We review the district court's decision granting summary judgment de novo, applying the same standards as that court. See id.

The district court found that:

Based upon the facts presented to the court, it would appear that Joshua was not entitled to educational services from the [Wichita USD] since he was neither living in or physically present in the district in November 1995, [*15] and was not living with a parent or person acting as a parent in the [Wichita USD]. Both Joshua's parents had moved out of the [Wichita USD]. Although plaintiffs assert that at some time Joshua continued to live in Wichita with his slightly older sister, the sister does not constitute a "person acting as parent" within the meaning of state law given the state of this record. Anita O. has directly acknowledged that she continued throughout this period to act to support Joshua and to make decisions regarding his control and education.

Appellant's App., Vol. IV at 873. The court concluded that "the uncontroverted facts establish that, by the time of the attempt, or, more accurately, the pretended attempt to enroll Joshua W. in November 1995, he cannot be considered a resident of the Wichita school district." Id. at 873-74 (footnote omitted).

Next, the court specifically found the evidentiary record before it supported the conclusion that "Anita O.'s actions were not prompted by a sincere effort to obtain a final decision from the [Wichita USD] regarding placement, but were simply seeking to manipulate the District into funding a placement upon which she had already [*16] resolved." Id. at 875 (footnote omitted). Because plaintiffs' Rehabilitation Act and § 1983 claims were based on the purported IDEA violation, the district court concluded that the individual

Wichita defendants were qualifiedly immune. See id. at 876. Last, the district court found Tompkins also qualifiedly immune. See id. at 878.

A review of the record confirms the district court's residency determination as well as its conclusions that Anita O.'s action in unilaterally placing Joshua W. in Three Springs was manipulative, was not undertaken for education purposes, and essentially obstructed the IDEA process. See *Wise v. Ohio Dep't of Educ., 80 F.3d 177, 184-85 (6th Cir. 1996)* (holding parents bear financial risk that unilateral private placement--without consent of school officials and effort to change placement through IDEA process--will not be reimbursed). Plaintiffs' arguments contra do not persuade us otherwise[5]. We agree with the district court, that, given these conclusions, there is no violation of constitutional and/or federal law, and plaintiffs' additional, undeveloped claims under the Rehabilitation Act and § 1983 fail, as do their claims [*17] against Tompkins.

IV. Kansas Board of Education

In this last issue, plaintiffs argue that the district court improperly dismissed the Kansas Board of Education under Fed. R. Civ. P. 4(m). We lack appellate jurisdiction to consider this issue. Specifically, the district court order from which plaintiffs seek relief was entered on November 10, 1998, approximately two months after their September 9, 1998 notice of appeal. The notice of appeal references only the two district court orders reviewed above. Plaintiffs must separately appeal the November 10, 1998 order and comply with the jurisdictional requirements of Fed. R. App. P. 3. See *Nolan v. United States Dep't of Justice, 973 F.2d 843, 846 (10th Cir. 1992)* ("Any subsequent appeals [after notice

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[5] In brief, plaintiffs argue that: while Joshua W. was not physically present in the Wichita USD, he continued to reside there; Joshua W.'s sister was acting as his parent; and Anita O.'s unilateral placement should not preclude reimbursement.

[*18] of appeal filed] must separately and individually comply with the Rules of Appellate Procedure."). For this reason, we also deny plaintiffs' motion for leave to amend their appeal to include all adverse district court orders through April 26, 1999 in lieu of filing separate appeals.

V. Conclusion

The judgments of the district court are AFFIRMED (orders dated June 19, 1997, and August 7, 1997), the plaintiffs' motion to amend their appeal to include all adverse district orders entered through April 26, 1999 is DENIED.

Entered for the Court

Robert H. Henry
Circuit Judge

APPENDIX B-MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS, DATED AND ENTERED NOVEMBER 10, 1998

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF KANSAS

Cause No. 97-1042-JTM

JOSHUA W. and ANITA O.,

Plaintiffs,

vs.

BOARD OF EDUCATION OF WICHITA PUBLIC SCHOOLS U.S.D. NO. 259, LARRY VAUGHN, THE KANSAS DEPARTMENT OF EDUCATION AND DR. ANDY TOMPKINS,

Defendants.

ORDER

On August 10, 1998, the court entered its order granting the summary judgment motions of defendants Unified School District No. 259 (the Wichita, Kansas school district) and Dr. Andy Tompkins. Plaintiffs subsequently appealed this decision. Currently before the court are two motions. In the first, the nominal defendant Kansas Department of Education has moved to dismiss the action for failure of service under Fed. R. Civ. Pr. 4 (m). In the second, the school district has moved for sanctions against plaintiffs.

Ordinarily, of course, a notice of appeal which is filed prior to the dismissal of all parties to an action is premature
in the absence of a Rule 54 (b) certification, and accordingly the notice "is ineffective to transfer jurisdiction from the district court to the court of appeal." Denver & Rio Grande Rd, v, Union Pac. Rd. , Case No. 93-1011-PFK, 1995 WL 254246 (D. Kan. April 28, 1995). However, where the remaining defendants have not been served with process, the unserved defendants are not deemed "parties" for purposes of Rule 54 (b), and the notice of appeal will not be considered premature. Bristol v. Fibreboard Corp., 789 F.2d 846 (10 Cir. 1986). Accordingly, the notice of appeal filed in the present action was not premature.

This court retains jurisdiction to consider matters collateral to the issues presented in the appeal. In particular, the court finds that it retains jurisdiction to consider the defendants' pending motions. A notice of appeal deprives the district court of jurisdiction to consider "the issues on appeal," but does not divest it of the ability to decide "collateral matters not involved in the appeal." Lancaster v. Independent Sch. Dist. No. 5, 149 F. 3d 1228 (10th Cir. 1998) (quoting Garcia v. Burlington Northern R. Co., 818 F. 2d 713, 721 (10th Cir. 1987). The validity of the state's motion under Rule 4 (m) was never in issue in the case prior to the notice of appeal, and there is no reason to think it would not be considered a collateral matter which the court has the power to consider. Indeed, cases which have held that unserved defendants are not "parties" for purposes of Rule 54 (b) have acknowledged that further action dismissing the unserved defendants would be taken by the district court. Federal Sav. & Loan Ins. V. Tullos-Pierremont, 894 F. 2d 1469, 1473 (5th Cir. 1990).

Having the ability to hear the state's motion, the court finds that it must be granted. Rule 4 (m) creates a strong presumption in favor of dismissal. If service is not perfected

in 120 days, the rule provides that the court "shall dismiss" the action, unless "the plaintiff shows good cause for the failure." Ignorance of the rules of procedure is not "good cause" within the meaning of Rule 4 (m). Buck v. Boeing Co. 103 F. 3d 137 (9th Cir. 1996). In Despain v. Salt Lake Area Metro Gang Unit, 13 F. 3d 1436 (10th Cir. 1994), the Tenth Circuit upheld a dismissal for untimely service, holding that "good cause" could not be predicated on actual notice of the action to the unserved defendants, a lack of prejudice to the defendants, or even allegations of "severe prejudice" to the plaintiffs. See also In re Kirkland, 86 F. 3d 172 (10th Cir. 1996) (inadvertence, neglect, mistakes of counsel, and absence of prejudice in themselves will not create good cause).

Good cause may be found where a defendant actively evades service. See, e.g., Cloyd v. Arthur Anderson & Co., 151 F.R.D. 407 (D. Utah 1993). Good cause may be found where the process server violates his duties of office. Byrd v. Stone, 94 F. 3d 217 (6th Cir. 1996). Whether a plaintiff has moved under Rule 6 (b) for an extension of time to obtain service is also an element to be considered. Gowan v. Teamsters Union No. 237, 170 F.R.D. 356 (C.D.N.Y. 1997). Here, the court is unable to find any potential rationale which the plaintiffs could offer which would serve as good cause. There is no indication that plaintiffs tried to serve the state, but were misled into thinking service had been achieved. Rather, the record indicates that no attempt at all was made to serve the state defendant. There has been no motion under Rule 6 (b). The plaintiffs may argue that they believed their service on the defendant Tompkins was the same thing as service on the state board of education. But, as indicated earlier, it is clear that mistakes of counsel and ignorance of the rule of service do not constitute good cause for extending the time of service. Hunsinger v. Gateway Management Assoc., 169 F.R.D. 152 (D. Kan. 1996); Slater v. Cincinnati Ins. Co., 165 F.R.D. 100 (D, Kan. 1996). Finally, is

anything, any consideration of potential prejudice would work against plaintiffs. Here, the failure of service has already lasted long beyond the 120-day limit. Substantial discovery in the matter has already occurred, and indeed dispositive motions have been submitted and considered.

The state school board's motion would be independently justified under D. Kan. Rule 7.4. This rule provides that, upon the failure to respond in a timely fashion to a motion, "the motion will be considered and decided as an uncontested motion, and ordinarily will be granted without further notice." Here, plaintiffs have neither responded to the state school board's motion nor filed any motion seeking an extension of time to respond.[6] Accordingly, the state school board's motion is granted on the merits and pursuant to Rule 7.4.

The court will also deny the Wichita school board's motion for sanctions. The court in its discretion will deny the motion for sanctions. Although, as it has indicated in its previous orders, the court shares many of the concerns expressed in defendant's motion as to the conduct of plaintiff Anita O. and counsel for plaintiffs, the court does not find an award of sanctions is justified. In its previous order of august 26, 1998, the court denied the Andover School district's motion for sanctions, and the Wichita board's motion will be denied on the same grounds.

IT IS ACCORDINGLY ORDERED this 10th day of November, 1998, that the motion to dismiss of defendant Kansas State School Board (Dkt. No. 111) is hereby granted; the motion for sanctions (Dkt. No. 113) of defendant U.S.D. No. 259 is hereby denied.

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[6] Plaintiffs did telephone the chambers of the undersigned, after the deadline for a response had already passed, seeking advice about whether to respond to the state school board's motion. It is not for the court to give advice on pleading to individual parties.

J. THOMAS MARTEN, JUDGE

APPENDIX C-JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS DATED NOVEMBER 10, 1998

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

Case No. 97-1042-JTM

JOSHUA W. and ANITA O.,

PLAINTIFFS,

v.

BOARD OF EDUCATION OF WICHITA PUBLIC SCHOOLS U.S.D. NO. 259, LARRY VAUGHN, THE KANSAS DEPARTMENT OF EDUCATION and DR. ANDY TOMPKINS,

DEFENDANTS.

JUDGMENT IN A CIVIL CASE

[X] Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED pursuant to the Order filed and entered on the docket on November 10, 1998 (Dkt. No. 120), that the motion to dismiss of defendant Kansas State School Board (Dkt. No. 111) is hereby granted; the motion for sanctions)Dkt. No. 113) of defendant U.S.D. No. 259 is hereby denied.

Dated: November 10, 1998 Ralph L. Deloach, Clerk

By: s/ S. Smith

Deputy Clerk

APPENDIX D-OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS DATED AUGUST 7, 1998

1998 U.S. Dist. LEXIS 12493

JOSHUA W. and ANITA O., Plaintiffs, vs. BOARD OF EDUCATION OF WICHITA PUBLIC SCHOOLS U.S.D. NO. 259, LARRY VAUGHN, THE KANSAS STATE BOARD OF EDUCATION, and DR. ANDY TOMPKINS, Defendants.

No. 97-1042-JTM

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

13 F. Supp. 2d 1199; 1998 U.S. Dist. LEXIS 12493

August 7, 1998, Decided

August 7, 1998, Filed

OPINIONBY:
J. THOMAS MARTEN

OPINION:

[*1200] MEMORANDUM AND ORDER

Plaintiffs Joshua W. and his mother Anita O. have brought the present action under the Individuals with Disabilities Education Act (IDEA), *20 U.S.C. § 1400* et seq. against the Wichita School District, U.S.D. 259, along with the individual members of the board of education and its Superintendent, Larry Vaughn, as well as the Kansas Board of Education and the Commissioner of Education, Dr. Andy [**2] Tompkins. In an order dated June 11, 1997, the court granted a motion to dismiss similar claims raised against the Andover School District. Currently before the court are two motions for summary judgment by the Wichita defendants and by Commissioner Tompkins.

Summary judgment is proper where the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). In considering a motion for summary judgment, the court must examine all evidence in a light most favorable to the opposing party. *McKenzie v. Mercy Hospital, 854 F.2d 365, 367 (10th Cir. 1988).* The party moving for summary judgment must demonstrate its entitlement to summary judgment beyond a [*1201] reasonable doubt. *Ellis v. El Paso Natural Gas Co., 754 F.2d 884, 885 (10th Cir. 1985).* The moving party need not disprove plaintiff's claim; it need only establish that the factual allegations have no legal significance. *Dayton Hudson Corp. v. Macerich Real Estate Co., 812 F.2d 1319, 1323 (10th Cir. 1987).*

In resisting a motion for summary [**3] judgment, the opposing party may not rely upon mere allegations or denials contained in its pleadings or briefs. Rather, the nonmoving party must come forward with specific facts showing the presence of a genuine issue of material fact for trial and significant probative evidence supporting the allegation. *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256, 91 L. Ed.*

2d 202, 106 S. Ct. 2505 (1986). Once the moving party has carried its burden under Rule 56(c), the party opposing summary judgment must do more than simply show there is some metaphysical doubt as to the material facts. "In the language of the Rule, the nonmoving party must come forward with 'specific facts showing that there is a genuine issue for trial.'" *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986)* (quoting Fed.R.Civ.P. 56(e)) (emphasis in Matsushita). One of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses, and the rule should be interpreted in a way that allows it to accomplish this purpose. *Celotex Corp. v. Catrett, 477 U.S. 317, 91 L. Ed. 2d 265, 106 S.* [**4] *Ct. 2548 (1986).*

1. Motion by the Wichita Defendants

The District's motion is similar to that advanced previously by the Andover School District -- that liability under IDEA does not exist since Joshua was not a resident of the school district[7]. The Wichita District argues that, on the basis of the facts produced in discovery, Joshua may have been a resident of the Andover District or some other location, but that he was not a resident of the Wichita District at the time of the attempted November 20, 1995 enrollment. The evidence and factual statements submitted by the parties compels the following findings of fact.

Joshua W. was born on May 1, 1978, and is now 19 years of age. His natural parents are Mr. Dennis W. and Ms. Anita O. Anita O., who has had sole custody of Joshua since a 1980 divorce, is the sole owner of W[ ] Building [**5] Maintenance, a commercial cleaning business with 175

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[7] In its prior order on the motion to dismiss, the court addressed the background and purposes of IDEA, and those conclusions are equally applicable here.

employees. Joshua W. and his parents resided in Wichita, Kansas while he was growing up, where he attended the public schools of U.S.D. 259 until approximately January 27, 1995.

District educators identified Joshua W. as behaviorally disordered, and he was given special education under the IDEA throughout his attendance in the school system pursuant to individualized education programs (IEP). In their response to the defendants' summary judgment motion, the plaintiffs vigorously and persistently attack the adequacy of these earlier programs, but the present complaint is directed solely at whether U.S.D. 259 is required to pay for the private residential placement in 1995.

In November of 1994, the District revised the IEP for Joshua, calling for placement in a special day school. Joshua's parents consented to the new IEP. The sixteen-year-old Joshua was transferred from Wichita High School Northwest to Sowers Alternative School, a special day school offering special education to behavior-disordered students. After arriving at Sowers, Joshua was on separate occasions confined as a juvenile offender at the Sedgwick County Youth Residence [**6] Hall (YRH), where he also received education services from the District.

On January 27, 1995, Joshua left YRH. He did not return to Sowers, and quit attending classes in the District's schools. He lived in a number of locations, both inside and outside Kansas. According to the testimony of Anita O., in February of 1995, Joshua was confined at juvenile facilities in Larned, Kansas for approximately six months. In July, he spent a brief period of time in Charter Hospital receiving substance abuse treatment. He also received mental and substance abuse treatment at Shadow Mountain, a residential facility in Tulsa, Oklahoma.

According to the plaintiffs, Joshua lived intermittently with his father, and could be [*1202] found at 144 S. Sheridan in Wichita. Anita O. provided Joshua's support.

On September 1, 1995, Joshua W. threatened Anita O. with a knife while she was driving him to St. John's Military School in Salina, Kansas. Anita O. filed a formal criminal complaint and Joshua was placed in the Saline County Jail. He was prosecuted as an adult for aggravated criminal assault in violation of K.S.A. 21-3410(a). He plead guilty to the charge on September 22, 1995. His sentencing hearing was [**7] scheduled for November 20, 1995, and he was authorized to attend Kemper Military Academy in Boonville, Missouri until the date of his sentencing.

Joshua began attending Kemper in early October, 1995. While at Kemper he was cited for violating the school's code of conduct and expelled at the order of the commandant.

Previously, on March 1, 1995, Anita O. changed her residence to a location outside U.S.D. 259, moving to a new home at 14221 East Sport of Kings, within the boundaries of U.S.D. 385, the Andover, Kansas School District. She acknowledged in her deposition that she knew she was moving into another school district because she had another school age child. Joshua's father, Dennis W., also left U.S.D. 259 in the spring of 1995, moving to Potwin, Kansas.

Prior to November 2, 1995, Anita O. contacted Three Springs Outdoor Therapeutic Program, a residential educational facility for adolescents in Centerville, Tennessee, to inquire about enrolling Joshua. On November 4, she completed a enrollment form for Three Springs for the 1995-96 school year. On November 6 and 7, she telephoned Three Springs six times. Joshua was eventually admitted to Three Springs on November 20, 1995. [**8] On November 16, Anita O. bought two airline tickets for herself and Joshua to fly from Kansas City, Missouri to Nashville, Tennessee.

She did not use the tickets. On November 17, 1995, she called the District's Office of Special Education and Robert Coleman, the principal of Sowers, to discuss Joshua's re-entry into the District school system. Coleman told Anita O. she should enroll Joshua at Sowers since this was the last placement under the IEP, and the staff there could then talk to her about options for placement. Joshua was then enrolled at Sowers, although he remained physically at Kemper. At this time, Joshua had not attended any school in the district for almost ten months. His IEP was due to be reviewed November 18, 1995. During the discussion on November 17, a meeting to discuss Joshua's placement was set for Monday, November 20 at Sowers.

On November 20, Anita O. met with Coleman, and with school psychologist Tom White, social worker Carolyn Moncivais, and guidance counselor Ken Henderson. Anita O. signed release forms so the staff could obtain information about Joshua's activities since last attending Sowers. Coleman told Anita O. that, pursuant to the IEP, Joshua would [**9] attend Sowers until the school got the additional information and developed a revised IEP and placement decision.

Anita O. asked for residential placement, but testified that she knew no decision had been made at that time. In addition, while she told the staff of the address in Wichita where Joshua would be living, Anita O. did not inform the District that she had moved into a new school district, nor did she inform the District that she had been working to enroll Joshua at Three Springs in Tennessee. According to her deposition testimony, Anita O.'s primary concern was finding a way for the District to pay for placement at Three Springs.

The same day Anita O. met with the Sowers staff, Joshua appeared in Saline County Court for the sentencing hearing which had been set nearly two months earlier. He was

sentenced to an 18-month term of imprisonment. In lieu of prison, the court put Joshua on probation for 24 months. As a condition of the probation, Joshua was required to enter and complete the program at Three Springs and obtain an alcohol, drug, and mental health evaluation there.

Immediately following her meeting with the Sowers staff in Wichita on November 20, Anita O. drove [**10] to Boonville, where she picked up Joshua. On November 21, they drove to Kansas City and then flew to Nashville, Tennessee. They used separate tickets from those purchased on November 16. Using a [*1203] rental car, they drove to Centerville and Joshua was placed at Three Springs. Following up the November 20 meeting, District staff tried to contact Anita O. to discover where Joshua was. Anita O. did not return these telephone calls. On December 4, her attorney wrote that she was beginning an administrative claim.

The District did not learn of Anita O.'s residence in the Andover School district until January 16, 1996. Following an evidentiary hearing on October 4, in which both the parties were represented by counsel and presented witnesses, an administrative hearing officer found that Joshua was not a resident of the District on November 20, 1995, and that the District was not financially responsible for his placement. Anita O. appealed this determination, which was affirmed by a state review officer appointed by the Kansas State Board of Education on December 31, 1996. The present action was instituted January 30, 1997.

Joshua attended Three Springs in Tennessee until October of 1996. On [**11] November 27, 1996, the Saline County District Court modified the terms of Joshua's probation, requiring him to enter and complete a program at Benchmark, a private facility in Redlands, California.

Joshua left without completing the Benchmark program after three months. On December 1, 1997, he was convicted

of two counts of aggravated assault and of possession of marijuana in the District Court of Sedgwick County. On January 8, 1998, he was sentenced to a term of imprisonment of 25 months.

Defendants argue there is evidence which directly contradicts the plaintiffs' assertion Joshua lived in Wichita. In bonding out on the Saline County criminal case, Joshua wrote that his address was 14221 East Sport of Kings, Wichita, Kansas, 67203 -- within the Andover School District. The plaintiffs deny this, and repeatedly point to an "SRS determination that Joshua not live with his mother." The document cited by plaintiffs, Exhibit 4, however, does not prohibit Joshua's living with his mother. Joshua had been admitted to Larned Youth Center following a felony theft. In Exhibit 4, a social worker for SRS wrote in August of 1994 that he was "approving his moving effectively to his father's home" [**12] in Wichita. Although the letter does recognize that there was a "conflictive relationship" between Joshua and his mother, the letter does not prohibit Joshua from living with his mother. Indeed, the letter actually contemplates the possibility that Joshua would stay with his mother, recommending the parties reach a joint set of rules "for Joshua to abide by regardless of which home he is at." (Exh. 4, emphasis added).

The main issue here is the IDEA claim by the plaintiffs against the District[8].
- [**13]

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[8] To the extent the Amended Complaint raises issues beyond the 1995-96 school year placement such as a denial of free appropriate public education (FAPE), those issues have never been subjected to administrative review, which considered only the narrow issue of Joshua's residency. Thus, the pervasive attack on the entirety of Joshua's education in the District, which the plaintiffs raise for the first time in their response to the summary judgment motion, should be dismissed for the failure to exhaust administrative remedies.

Two grounds exist for dismissing the present action. As noted in the court's order of June 11, 1997, a school district's obligation to enroll a given student turns upon residency. KSA 72-1046(a) provides a right to attend school in a district based upon residence:

Any child who has attained the age of eligibility for school attendance may attend school in the district in which the child lives if (1) the child lives with a resident of the district and the resident is the parent, or a person acting as parent, of the child....

The statute also explicitly defines "a person acting as parent" as

(A) a guardian or conservator, or B) a person, other than a parent, who is liable by law to maintain, care for, or support the child, or who has actual care and control of the child and is contributing the major portion of the cost of support of the child, or who has actual care and control of the child with the written consent of a person who has legal custody of the child, or who has been granted custody of the child by a court of competent jurisdiction....

72-1046(d).

Based upon the facts presented to the court, it would appear that Joshua was not [*1204] entitled to [**14] educational services from the District since he was neither living in or physically present in the district in November 1995, and was not living with a parent or person acting as a parent in the District. Both Joshua's parents had moved out of the School District. Although plaintiffs assert that at some time Joshua continued to live in Wichita with his slightly older sister, the sister does not constitute a "person acting as parent" within the meaning of state law given the state of this

record. Anita O. has directly acknowledged that she continued throughout this period to act to support Joshua and to make decisions regarding his control and education.

As the court previously concluded, a school district has the obligation under IDEA to seek out disabled children, whether they are enrolled or not, who require special attention. See *Robertson County Sch. Sys. v. King, 1996 U.S. App. LEXIS 27257,* 24 IDELR 1036, Case No. 95-5526 (6th Cir. 1996). A school district is not required, however, to disregard established rules of residency and undertake the burdensome task of searching throughout the entire state for disabled children. See *Susan R.M. v. Northeast Independent School District, 818 F.2d 455 (5th* [**15] *Cir. 1987);* Hall by and through *Allread v. Freeman, 700 F. Supp. 1106 (N.D. Ga. 1987).* Here, the uncontroverted facts establish that, by the time of the attempt, or, more accurately, the pretended attempt to enroll Joshua in November of 1995, he cannot be considered a resident of the Wichita school district[9].
- [**16]

The District also argues that plaintiffs should not be permitted to impose financial responsibility on the District where Anita O.'s own actions effectively prevented the District from reviewing Joshua's status and formulating a new IEP. The purpose of the IDEA is to "ensure that the local educational agency and the parents work collectively in finding an appropriate placement for their child." *Fagan v.*

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[9] The present result is not inconsistent with earlier dismissal of the Andover school district, which reflected a failure in the pleadings by the plaintiffs; the present summary judgment motion is premised on a failure of proof. That is, the action against the Andover School District could not be maintained in light of the plaintiffs' direct statement in the complaint that Joshua had "resided all his life" in the Wichita School District. The plaintiff never attempted to correct or even qualify this assertion by amendment or other means. The uncontroverted facts submitted with the present motion establish that Joshua was not residing in the Wichita school district during the time prior to his enrollment.

District of Columbia, 817 F. Supp. 161, 164 (D.D.C. 1993). If a parent's acts frustrate the decision making process, the parent may be estopped from relief under the IDEA. Thus, in *Wise v. Ohio Dept. of Educ., 80 F.3d 177, 184 (6th Cir. 1996),* the court concluded that by "unilaterally changing their children's educational placements, the parents are not entitled to have their children educated at public expense."

The evidentiary record before the court supports a similar conclusion. At the time she contacted District officials in November, 1995, Anita O. had effectively engineered Joshua's placement in a private facility in Tennessee. She had purchased airline tickets for travel to Tennessee, and had enrolled her son at the Tennessee facility. She mentioned none of this to [**17] District staff. She has acknowledged that, at the conclusion of her discussions with the staff, she knew the District had made no decision regarding Joshua's placement. She knew that the staff said they "would need to further evaluate Josh and Josh's situation before they made a final decision." (Tr. at 209). When the staff asked where Joshua was living, she stated that he could be picked up at the address on South Sheridan, even though she knew Joshua was currently at a military school in Missouri and would be moved to Tennessee immediately after her discussion with the staff.

Thus, Anita O.'s actions were not prompted by a sincere effort to obtain a final decision from the District regarding placement, but were simply seeking to manipulate the District into funding a placement upon which she had already resolved[10].

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[10] As noted previously, the court is not unmindful of plaintiffs' claims that the District for several years failed to fulfill plaintiff's obvious need for a residential placement, and that it never had such a facility in the District. Those claims may be valid, but do not fall within the scope of this action as plaintiffs framed it.

[*1205] In the Amended Complaint filed by plaintiffs, the allegations which form the core of the IDEA claim are substantially repeated and then set forth in Counts II and III as violations of section 504 (FAPE) and *42 U.S.C. § 1983.* In light of the findings cited above relating to the removal of Joshua from Kansas, the court finds the individual Wichita School District defendants are qualifiedly immune with respect to the section 504 and *42 U.S.C. § 1983* claims advanced by plaintiffs.

2. Motion by Defendant Tompkins

Defendant Tompkins explicitly adopts the argument of the Wichita District that Anita O. frustrated the evaluation process. He also argues he is qualifiedly immune for failing to intervene in the due process proceedings initiated by Anita O. Finally, he argues generally that tuition reimbursement is inappropriate and there is no guarantee of a free public education where a special education student voluntarily accepts admission to an out-of-state facility at his own expense to escape imprisonment as the result of a felony criminal case.

The plaintiffs have now submitted a Response to Tompkins' Motion for Summary Judgment. Despite obtaining an extension of time [**19] to file their response, the response was filed several days beyond the extended deadline. It was not signed by local counsel[11]. Most importantly, the Response provides only a separate narrative of the facts, completely ignoring the statement of facts in Tompkins' motion. The Response thus violates D. Kan. Rules 7.4, 83.5.4(c), and 56.1.

The court finds that the first two violations should not be and are not fatal to plaintiffs' claims. The delay in the

[11] Another copy was filed approximately one week later which was signed by local counsel.

response was not significant, and plaintiffs have subsequently obtained new local counsel who has filed an appearance in the matter. The failure to comply with the standards for responding to a motion for summary judgment cannot be excused so easily, however. Rule 56.1 contains its own sanction -- all of the facts presented in the defendant's motion will be deemed uncontroverted[12].

Since the facts presented to the court are wholly those presented by defendant, the court is compelled to concur with each of the arguments advanced by the defendant. Accordingly, the court finds the placement in Tennessee to obtain probation does not qualify as a unilateral placement for educational purposes under *Burlington School Comm. v. Mass. Dept. of Ed., 471 U.S. 359, 371, 85 L. Ed. 2d 385, 105 S. Ct. 1996 (1985);* that defendant Tompkins did not violate plaintiffs' due process rights and in any event is qualifiedly immune; and that Anita O.'s actions effectively frustrated the evaluation and review of Joshua's placement. Accordingly the claims against defendant Tompkins will be dismissed.

A motion to reconsider is neither invited nor encouraged. Any such motion shall be filed within ten days of the date of this order. Any motion for reconsideration must comply with Rule 7.3 of this court and the standards set out in *Comeau v. Rupp, 810 F. Supp. 1172, 1174 (D.Kan.1992).* The motion may not exceed five pages in length, including supporting arguments and authorities, regardless of the number of points raised. Responses shall be filed within five days of the date of such [**21] a motion, and shall be limited to four pages each. No replies may be filed.

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[12] Nor will the court delve through defendants' lengthy narrative in an attempt to correct the error and identify controverted facts. The very purpose of Rule 56.1 is to avoid such a misdirection of judicial resources. Moreover, such an approach would vitiate the explicit sanction contained within the rule -- the requirement that the facts which are not admitted or denied will be deemed admitted.

IT IS ACCORDINGLY ORDERED this 7th day of August, 1998, that the defendants' Summary Judgment Motions (Dkt. Nos. 68 and 96) are granted.

J. THOMAS MARTEN, JUDGE

APPENDIX E- MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS DATED AND ENTERED JULY 22, 1997

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS
NO. 97-1042-JTM
JOSHUA W. and ANITO O.,

Plaintiffs

vs.

BOARD OF EDUCATION OF WICHITA PUBLIC SCHOOLS, U.S.D. 259; et al.,

Defendants

MEMORANDUM AND ORDER

The plaintiffs in the present action, Joshua W. and Anita O., brought a claim against the Wichita and Andover School Districts under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 et seq. On June 11, 1997, the court granted the Andover defendants' motion to dismiss, finding the fact allegations in the complaint that Joshua W. had lived "all his life" in the Wichita School District precluded any recovery against the Andover defendants.

The plaintiffs now move for reconsideration of the June 11 order. A motion to reconsider under Fed.R.Civ.P. 59 (e) may be granted to correct manifest errors or in light of newly discovered evidence. Such a motion is directed not at initial consideration but reconsideration, and is appropriate only if (1) the court has obviously misapprehended a party's

position, the facts, or applicable law; (2) the court has mistakenly decided issues not presented for determination; or (3) the moving party produces new evidence which it could not have obtained through the exercise of due diligence. Anderson v. United Auto Workers, 738 F.Supp. 441, 442 (D Kan. 1989). A motion to reconsider is not "a second chance for the losing party to make its strongest case or to dress up arguments that previously failed." Voelkel v. GMC, 846 F. Supp. 1482 (D. Kan.), aff'd, 43 F. 3d 1484 (10th Cir. 1994). The resolution of the motion is committed to the sound discretion of the court. Hancock v. City of Oklahoma City, 857 F. 2d 1394, 1395)10th Cir. 1988).

The sole issue before the court in its prior order was the sufficiency of plaintiffs' complaint against the Andover defendants. As noted in the order of June 11, the express fact allegations of the complaint, which plaintiffs have not attempted to amend, prevent any recovery under IDEA against the Andover defendants. The plaintiffs' current motion raises no new fact allegations or arguments demonstrating error in the court's application of the law. Rather, plaintiffs argue that "by process of elimination" one of the school districts must be responsible. This argument is wholly without merit: the plaintiff's claims against the Andover defendants were barred by their own admissions; their claims against the Wichita defendants are, for now, legally sufficient; and plaintiffs will be given the opportunity to prove those claims at trial and, upon motion, at summary judgment.

IT IS ACCORDINGLY ORDERED this 21st day of July, 1997, that plaintiff's motion to reconsider (Dkt. No. 34) is hereby denied.

SO ORDERED.

ENTERED: July 22, 1997

s/ J. THOMAS MARTEN
J. THOMAS MARTEN, JUDGE
UNITED STATES DISTRICT COURT

APPENDIX F- MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS DATED JUNE 10, 1997 AND ENTERED JUNE 11, 1997

1997 U.S. Dist. LEXIS 9457

JOSHUA W. and ANITA O., Plaintiffs, vs. BOARD OF EDUCATION OF WICHITA PUBLIC SCHOOLS, U.S.D. NO. 259; LARRY VAUGHN; JANET DANITSCHEK; CHIP GRAMKE; CLARADINE JOHNSON; MARTY MARSHALL; CAROL RUPE; JEAN SCHODORF; JEROME WILLIAMS; BOARD OF EDUCATION OF ANDOVER, U.S.D. NO. 385; PATRICK TERRY; PAM CLAPP; GARY HARMON; REED HARRISON; CARLY HAYNES; NANCY KIRKENDOLL; NANCY LUSK; RICH STENSON; ALAN ALDERSON; THE KANSAS DEPARTMENT OF EDUCATION; and DR. ANDY TOMPKINS, Defendants.

No. 97-1042-JTM

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

1997 U.S. Dist. LEXIS 9457

June 10, 1997, Decided

June 11, 1997, FILED

OPINIONBY:
J. THOMAS MARTEN

OPINION:

MEMORANDUM AND ORDER

In the present action, the plaintiffs, Joshua W. and his mother Anita O., have raised a claim under the Individuals with Disabilities Education Act (IDEA), *20 U.S.C. § 1400* et seq., against the Wichita and Andover Unified School Districts, the individual members of the school boards, and the Kansas Department of Education. The Andover defendants have filed a motion to dismiss and a motion for sanctions. For the reasons discussed herein, [*2] the court will grant the former and deny the latter.

According to the complaint, since March 1, 1995, Anita O. has resided in the Andover School District at 14221 East Sport of Kings, Wichita, Kansas. However, her son, Joshua W., has never lived at the Sport of Kings address, and has never lived in the Andover School District. Instead, Joshua has "resided all his life in the Kansas school district of Wichita U.S.D. 259." (Complaint, P 3.)

On November 17, 1995, Anita O. contacted the Wichita School District and asked for residential special education placement for Joshua. Anita O. "made sure that Joshua W. was enrolled in Wichita 259 where he lived and provided Wichita 259 with her home address." (Complaint, P 24.) The Wichita School District denied this request on November 20, 1995, and on the next day Anita O. placed Joshua in Three

Springs residential special education placement in Tennessee (Id. at P 32.)

Anita O. filed a request for an impartial due process hearing against the Wichita School District. On January 16, 1996, the Wichita School District upheld its decision. On February 1, counsel for Anita O. sent a letter to the Andover School District requesting a hearing, [*3] and asking that the Andover School District be joined to the pending hearing against the Wichita School District "in the event that it is determined that [the Andover District] is ultimately responsible. (Complaint, Attach. C.) It is admitted that Anita O. never attempted to enroll Joshua in the Andover School District and never asked that district to evaluate Joshua or prepare and IEP for him.

Under IDEA, Congress provides federal money to state and local educational agencies for the education of disabled children, and has required the states to provide all disabled children with a "free appropriate public education." *20 U.S.C. § 1401*(a)(18). See *Urban by Urban v. Jefferson County School Dist. R-1, 89 F.3d 720, 722 (10th Cir. 1996).* To implement this goal, the states must provide each disabled child with an individualized education program (IEP), which must be reviewed at least annually. *20 U.S.C. § 1414*(a)(5). Congress intended that IDEA's promise of a "free appropriate public education" for disabled children would normally be met by an IEP's provision for education in the regular public schools or in private schools chosen jointly by school officials and parents.

Section [*4] 1401(a)(18) defines "free appropriate public education" as special educational services which

(A) have been provided at public expense, under public supervision and direction, and without charge,

(B) meet the standards of the State educational agency,

(C) include an appropriate preschool, elementary, or secondary school education in the State involved, and

(D) are provided in conformity with the individualized education program . . . ."

Under the IDEA, parents are entitled to bring a complaint on any matter relating to the evaluation or placement of their child and seek an impartial due process hearing on their complaint. Specifically, *20 U.S.C. § 1415*(b) provides:

(1) The procedures required by this section shall include, but shall not be limited to--

(A) an opportunity for the parents or guardian of a child with a disability to examine all relevant records with respect to the identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education to such child, and to obtain an independent educational evaluation of the child;

(B) procedures to protect the rights of the child whenever the parents or guardian of [*5] the child are not known, unavailable, or the child is a ward of the State, including the assignment of an individual (who shall not be an employee of the State educational agency, local educational agency, or intermediate educational unit involved in the education or care of the child) to act as a surrogate for the parents or guardian;

(C) written prior notice to the parents or guardian of the child whenever such agency or unit--

(i) proposes to initiate or change, or

(ii) refuses to initiate or change,

the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to the child;

(D) procedures designed to assure that the notice required by clause (C) fully informs the parents or guardian, in the parents' or guardian's native language, unless it clearly is not feasible to do so, of all procedures available pursuant to this section; and

(E) an opportunity to present complaints with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child.

(2) Whenever a complaint has been received under paragraph [*6] (1) of this subsection, the parents or guardian shall have an opportunity for an impartial due process hearing which shall be conducted by the State educational agency or by the local educational agency or intermediate educational unit, as determined by State law or by the State educational agency. No hearing conducted pursuant to the requirements of this paragraph shall be conducted by an employee of such agency or unit involved in the education or care of the child.

Any party aggrieved by the hearing officer's administrative findings and decision may appeal to the state educational agency for an independent and impartial review. *20 U.S.C. § 1415*(c). The reviewing officer must make an independent decision. Adverse decisions may be appealed to a district court without respect to the amount in controversy under § 1415(e)(2). The reviewing court must examine the records of the administrative proceedings, hear additional evidence if requested by a party, and base its decision on the preponderance of the evidence.

Under *34 C.F.R. 300.506(b)*, the impartial due process hearing is to be conducted by "the SEA [state education agency] or the public agency directly responsible for the [*7] education of the child, as determined under State statute, State regulation, or a written policy of the SEA." In Kansas, the due process hearing is the responsibility of the local

education agency (LEA) responsible for the education of the student. K.A.R. 91-12-44.

The Kansas State Plan for Special Education provides that "local education agency" is defined as

a. the unified school district in which the student lives either with his or her parents, or in a community placement made by district court of the Department of Social and Rehabilitation Services (SRS) or

b. SRS if a student has been admitted to or is housed and maintained in a State institution.

(Defs.' Memo., Ex. B at 85.)

This portion of the state plan is consistent with K.S.A. 72-1046(a), which provides:

(a) Any child who has attained the age of eligibility for school attendance may attend school in the district in which the child lives if (1) the child lives with a resident of the district and the resident is the parent, or a person acting as parent, of the child; or (2) subject to the provisions of subsection (c), the child lives in the district as a result of placement therein by a district [*8] court or by the secretary of social and rehabilitation services; or (3) the child is a homeless child.

Dismissal of the present action would appear appropriate, since the complaint itself establishes that Joshua has never resided in the Andover School District. Kansas law clearly establishes that the local institution responsible for complying with the terms of the IDEA is the local school district in which the student actually resides.

In their response, the plaintiffs make only two arguments of substance. First, they argue the Andover School District had an obligation under the IDEA to seek out and provide

assistance to Joshua. The cases cited by the plaintiffs, however, merely establish that a school district has this obligation with regard to enrolled or unenrolled children. See Robertson County Sch. Sys. v. King, 24 IDELR 1036, Case No. 95-5526 (6th Cir. 1996). The plaintiffs cite no case or authority to establish that a school district must or should disregard established rules of residency and undertake the burdensome task of searching throughout the entire state for disabled children. To the contrary, residency does provide a limitation on the scope of a given school [*9] district's duty under the IDEA. See *Susan R.M. v. Northeast Independent School District, 818 F.2d 455 (5th Cir. 1987); Hall v. Freeman, 700 F. Supp. 1106 (N.D. Ga. 1987).*

The plaintiffs also cite K.S.A. 72-1046(b), which provides:

(b) Any child who has attained the age of eligibility for school attendance may attend school in a school district in which the child is not a resident if the school district in which the child resides has entered into an agreement with such other school district in accordance with and under authority of K.S.A. 72-8233, and amendments thereto.

However, subsection (b), by its express terms, is permissive only. It certainly did not compel Andover School District to consider Joshua W., who had never resided in the district and never attempted to enroll within the district as an actual or potential student.

Accordingly, the court will grant the Andover defendants' motion to dismiss the complaint. The result advocated by the plaintiffs would unreasonably and unnecessarily extend the scope of the IDEA, requiring local school districts to disregard established residency rules and conduct statewide searches for prospective students with disabilities. [*10]

There remains the motion for sanctions filed contemporaneously by the Andover School District. It must be noted the plaintiffs defend against the motion for sanctions on the same grounds as for the motion to dismiss -- that the action is in fact meritorious. As indicated above, the court finds no substantial justification for this position; the plaintiffs' arguments are no more correct with regard to rebutting the motion for sanctions than they are in defending against the motion for dismissal.

However, there are two potential fact circumstances which mitigate against an award of sanctions for filing the claim against the Andover School District. First, in its published statement, the Wichita School District denied the request for placement on the grounds that Joshua W. was a resident of the Andover School District. Second, in its published statement denying placement, the Andover School District did so for the stated reason that Joshua was not "enrolled" in the district.

Neither fact supports denying the motion to dismiss. With respect to the second of these two points, it is incorrect as a matter of law since, as discussed earlier, "enrollment" does not limit a school district's [*11] duty under the IDEA. Residency, however, does, as the plaintiffs would have known if they had reviewed the applicable law. With respect to the first point, whatever the Wichita School District may have said, the plaintiffs plainly disagree, alleging that Joshua has lived "all his life" in the Wichita School District. The complaint is completely devoid of any allegation that Joshua ever resided in the Andover School District. Since these facts at least provide some potential justification for concluding that the action against the Andover defendants was not undertaken for any improper purpose, the court in its discretion will deny the motion for sanctions.

IT IS ACCORDINGLY ORDERED this 10th day of June, 1997, that the Andover defendants' motion to dismiss

(Dkt. No. 20) is granted; their motion for sanctions (Dkt. No. 25) is denied.

J. THOMAS MARTEN, JUDGE

APPENDIX G - DECISION OF THE SPECIAL EDUCATION DUE PROCESS REVIEWING OFFICER DATED DECEMBER 31, 1996

BEFORE THE SPECIAL EDUCATION DUE PROCESS REVIEWING OFFICER

IN THE MATTER OF JOSHUA W. AND THE UNIFIED SCHOOL DISTRICT #259

REVIEWING OFFICER'S REPORT

NOW, on this 31st, day of December, 1996, the decision of the Reviewing Officer is rendered in the above-captioned appeal. Pursuant to K.S.A. 1995 Supp. 72-874, the Reviewing Officer has:

(1) Examined the record of the hearing:
(2) determined whether the procedures at the hearing were in accordance with the requirements of due process;
(3) determined that neither oral nor written argument was necessary;
(4) determined that no additional evidence was necessary for a final resolution;
(5) rendered a decision within a period which was extended by agreement of both parties; and
(6) has sent written notice of this decision on the appeal of both parties.

The Notice of Appeal was filed by Counsel for the child's Mother on November 12, 1996, following a due process hearing decision filed by Michael P. Tilford. The Hearing Officer's Decision was filed on or about October 13, 1996. Therefore, the Notice of Appeal was timely filed.

By letter dated November 18, 1996, the Reviewing Officer established that he would review the record prior

to determining whether additional evidence would be necessary. By that letter, the Reviewing Officer requested that the Hearing Officer's Decision and the record on appeal be forwarded to the Reviewing Officer. The Decision and the transcript with exhibits were received by the Reviewing Officer on or about December 2, 1996. By the letter dated November 18, 1996, the Reviewing Officer advised that a waiver of the twenty-day review requirement of K.S.A. 1995 Supp. 72-974, pursuant to K.S.A. 72-975 (c), would be necessary.

Having reviewed the record, this matter is now ripe for the Reviewing Officer's Report.

NATURE OF DISPUTE

This is an appeal from a decision rendered by Michael P. Tilford, Hearing Officer, on the 13th day of October, 1996, which found that Joshua W. was not a resident of USD 259 during the 1995-96 school year.

DUE PROCESS PROCEEDINGS

Based upon a thorough review of the record in this matter, it is the opinion of the Reviewing Officer that appropriate due process procedures have been followed and applied by the Hearing Officer in this matter. The Reviewing Officer finds that all of the due process procedural requirements set forth in K.S.A. 72-973 have been provided as follows:

1. The hearing provided for in K.S.A. 72-972 was held a place reasonably convenient to the parents of Joshua Wilson;
2. the hearing was closed at the request of the parents;
3. the following procedural due process rights were afforded:
    (a) The right of each party to have counsel of their own choice and to receive the advice of such counsel;
    (b) the child, Joshua W., was given the opportunity to be present at the hearing;

(c) Joshua W. and his parents have been given an opportunity to read a full report of the testimony of witnesses responsible for recommending the School District's proposed action and all other material witnesses:
(d) each of the parties was given the opportunity to confront and cross-examine witnessed who were required to appear in person at the hearing, either voluntarily or as a result of the issuance of a subpoena;
(e) neither party was denied the right to present witnessed in person or their testimony by affidavit;
(f) both the child and the parents were given the opportunity to testify and give reasons in opposition to the proposed action of the School District;
(g) each of the parties was given the right to prohibit the presentation of any evidence at the hearing which has not been disclosed to them at least five (5) days prior to the hearing;
(h) the parties were each afforded an orderly hearing;
(i) the child, Joshua W., has been afforded a fair and impartial decision based upon substantial evidence in all other regards; and
(j) the parties have been given the right to have a record made of the hearing by an official court reporter; and

4. Furthermore, there is no evidence in the record which would indicate that the Hearing Officer was a person:
(a) Responsible for recommending the action upon which the hearing was based;
(b) who had a personal or professional interest which would conflict with objectivity in the hearing; or

(c) who is an employee of any agency involved in the education of Joshua Wilson.

DECISION OF THE REVIEWING OFFICER

The Mother's own evidence indicates she knew she lived in the Andover School district and not in USD 259 at all relevant times. She testified that she did not realize there was a residency problem, considering that Joshua had spent his entire life in the district, and the school district had not brought up the issue.

However, the evidence also indicates that the school district had no reason to know of any residency problem. There was no reason for the district to have provided Mrs. O. with non-resident enrollment forms.

Whether Mrs. O acted properly to protect her child's rights in other respects was not at issue at this hearing. The narrow issue involving the potential responsibility of USD 259 for Joshua's residential placement at three Springs was properly decided by the Hearing Officer's determination that Joshua W. was not a resident of USD 259 at the time his Mother appeared on his behalf for enrollment on November 20, 1995.

CONCLUSION

The Hearing Officer's Decision is Affirmed.

Date: December 31, 1996 s/ Alan F. Alderson, No. 8390

ALDERSON, ALDERSON & MONTGOMERY, L.L.C.

2101 SW 21ST Street

Topeka, Kansas 66604 (913) 232-0753

Reviewing Officer

CERTIFICATE OF MAILING

Alan F. Alderson hereby certifies that on this 31st day of December, 1996, he caused the original of the Reviewing Officer's Report to the hand-delivered to the Kansas Department of Education, 120 S.E. 10th Street, Topeka, Kansas, and a true and correct copy of the above and foregoing Reviewing Officer's Report to the deposited in the

United States Mail, first class, postage prepaid, addressed to the following:

Thomas R. Powell
Hinkle, Eberhart & Elkouri, L.L.C.
2000 EPIC Center
301 N. Main Street
Wichita, Kansas 67202-4820

Margie Best, Attorney
One North LaSalle Street
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CONNELL & CONNELL
318 West Central
P.O. Box 6
El Dorado, Kansas 67042

DATE: December 31, 1996 s/ Alan F. Alderson

APPENDIX H-DECISION OF HEARING OFFICER REPORT

HEARING OFFICE REPORT

Special Education Due Process Hearing for: Joshua W.
DOB: 5/1/78

Reason for Hearing: Parental objection to school district's determination that Joshua is not a resident of the Wichita School district, USD 259, and that the district does not have jurisdiction with regard to his education.

Hearing Officer: Michael P. Tilford

Date of Hearing: Friday, October 4, 1996

Time of Hearing: 9:00 a.m. – 3:30 p.m.

Location: 2000 Epic Center, 301 N. Main, Wichita, Kansas, Conference Room

Participants:

Anita O-Mother of Joshua W.
Margie Best-Counsel for Parent
Patricia Coffey-Counsel for Parent
Patrick Terry-Superintendent of Schools, Andover, USD 385
Mark Hartke-Department of Special Education, USD 259
Jerry Stewart-Director of Special Education, USD 259
Thomas Powell-Counsel for School District
Roger Theis-Counsel for School District
Terry Bachus-Executive Director of Special Education, USD 259
Robert Coleman-Principal, Sowers Alternative School USD 259
Carolyn Moncivias-Social Worker, Sowers Alternative School, USD 259
John Updegrove-Supervisor of Pupil Accounting, USD 259
Mary Stevens-Recording Secretary

Both Stenographic and audiotape records of the hearing were made.

HEARING DECISION: The Hearing Officer finds that Joshua W. was not a resident of the Wichita School District, USD 259, at the time he was represented for enrollment for the 1995-96 school year by his mother on or about November 20, 1995. The evidence and testimony presented in support of the parent's contention that Joshua was a resident of USD 259 at that time filed to contradict the Kansas statutes and regulations which establish the requirements for residency for education purposes. Under this decision, the Wichita school district has no responsibility for Joshua's program at Three Springs in Tennessee.

HEARING DECISION

This section is designed to present and discuss findings of fact and conclusions of law which relate to the decision of the Hearing Officer.

The issue for this hearing is very narrow. For the purpose of resolving the conflict between the parent and USD 259 about the responsibility for paying the costs of Joshua's program at Three springs, the issue to decide is whether Joshua was a resident of the district when he was enrolled on or about November 20, 1995. As noted in the decision, he is not. Kansas statutes are very explicit in defining the requirements for residency in school districts and delineate clearly the relationship of the child to parents and non-parents insofar as residency is concerned. There is no provision for a child under the age of 18 to establish residency in the absence of direct or indirect parental responsibility.

Most of the questioning of witnesses in this hearing centered on USD 259 Board policy P5506, which is titled, NON RESIDENT ENROLLMENT AND ADMISSION [underlining added]. It is the view of the Hearing Officer that

the statements in the policy refer only to non-resident students, making the focus on the policy appear to be a tacit acceptance that Joshua is not a resident of the district. Even if Joshua's enrollment on or about November 20, 1995, had been allowed to stand under the waiver possibilities, he would have remained a non-resident under the policy. A non-resident student who is permitted to enroll, even before September 20, is still a non-resident.

The attorney for the parent asked several witnessed when did Joshua cease to be a resident of USD 259. This is a fair question. In the opinion of the Hearing Officer, Joshua ceased to be a resident of USD 259 when his father left the district. Prior to that time Joshua met the residency expectations of K.S.A. 72-1046, (a), (1) because he was living with his father. Simply, "living with his adult sister", did not serve as an adequate substitute for the assertion of residency. The movement of Joshua's mother out of the district on March 1, 1995, did not have an impact on Joshua's residency until the father moved, thereby eliminating any parental residency in USD 259, and, therefore, USD 259 responsibility for his education. It is beyond the purpose of this hearing to determine who does have the responsibility for Joshua's educational program at Three Springs.

The parent's brief contained several detailed descriptions of cases involving the issue of residency in the delivery of and payment for special education services. While this information is appreciated, the situations differ significantly from this case primarily because of the clarity of the State's definitions and descriptions of residency at it relates to the responsibilities of both parents and school districts.

The Hearing Officer accepts the position of the school district that its determination that Joshua's residency in the district did not occur until January, 1996, rather than at the conference on November 20, because it was not realized until later that the Sport of Kings address was outside of its

boundaries. There was not evidence or testimony to refute this assertion. The fact that Joshua did not live with his mother was not a cause to trigger an investigation because he had not lived with his mother at her previous address within the district. The suggestion that the district's motives were fueled by concerns of the costs of a residential placement of Joshua was not supported by sufficient evidence or testimony.

In the closing statement of the attorney for the school district, the lack of authority of the hearing officer to grant a waiver of the non-resident enrollment policy because of severe hardships or very unique circumstances was strongly asserted. It is important to realize that the parent did not request that the hearing officer grant a waiver to the non-enrollment policy. In the opinion of the Hearing Officer, if a request for a waiver of the policy due to severe hardships or very unique circumstances had been made it would have been proper to consider the request. It is also the opinion of the Hearing Officer that a response to such a request could reverse a decision that the school district had already made. If this were not so, there would be little purpose to these and similar proceedings.

HEARING SUMMARY
Joshua W.
The following exhibits were entered into evidence for the hearing:
Title (Date)
Parents
#1 Letter from Atty. Margie Best to Dr. Larry Vaughn (December 4, 1996)
#2,3 Atty. Best's motion to appear Pro Hac Vice (January 7, 1996)
#4 Atty. Best's Certificate of Admission to the Bar of Illinois (January 4, 1996)

#5 Atty. Best's Certificate of good Standing, Northern District of Illinois (January 4, 1996)
#6 Atty. Best's Certificate of Good Standing, United States Court of appeals for the Seventh District (January 3, 1996)
#7 Letter from Hearing Officer to Atty. Best (January 21, 1996)
#8 Letter from Atty. Best to Dr. Patrick Terry (February 1, 1996)
#9 Letter from Atty. James Hargrove to Atty. Best (February 2, 1996)
#10,11 Letter from Atty. Best to Hearing Officer (February 2, 1996)
#12,13 Affidavit by Anita O. (February 1, 1996)
#14 Letter to Atty. Best and Mr. Mark Hartke (February 11, 1996)
#15 Letter from Atty. Best to Hearing Officer (February 22, 1996)
#16 Letter to Atty. Best and Mr. Hartke (May 28, 1996)
#17 Letter from hearing Officer to Atty. Best and Atty. Thomas Powell (September 15, 1996)\
Also entered and accepted is the parent's Brief in support of Joshua's Residency in U.S.D. 259.
School District
#1 Affidavit by Anita O. (February 1, 1996)
#2 USD 259 Board Policy P5506 (August, 1996)
#3 Parent's Permission to Exchange Information (11/20/95)
#4 Student Inquiry Form for Joshua (no date)
#5 Kansas Administrative Regulations, 72-946 through 72-967; 72-1035 through 1046; 72-8231 through 72-8234 (no date)
#6 Copies of pages 84-89 of Education of Handicapped (no date)
#7 Copy of page 48-49 of Education of Handicapped (no date)

#9 Map of Unified School District No. 259, 1993-94 (no date)

#10 Copies of Envelopes Addressed to Ms. Anita O. (December, 1995)

#11 Materials submitted by Ms. Anita O. in response to subpoena

Also entered and accepted is the school district's Prehearing Brief of U.S.D. 259 on the Issue of Residency.

The special education due process hearing was called to order at 9:00 a.m. on Friday, October 4, 1996. The Hearing Officer referred to an agenda for the hearing which he distributed. Those present were asked to introduce themselves. The proceedings were recorded on audiotape and by a court stenographer. The Hearing Officer stated that the purpose of the hearing is to resolve the issue of Joshua's residence as it pertains to whether or not the Wichita School District, USD 259, has the responsibility for his education. The burden of proof is on Joshua's parents and it is a closed hearing. Both parties indicated that they have understood their rights in the due process proceedings.

An oath of truth was administered to those who would be giving testimony. At the request of the parent's attorney, and without objection from the school district, the witnesses were sequestered.

The Hearing Officer approved an earlier motion to admit Attorney Margie Best, Pro Hac Vice

Attorney Best stated that she had a pending motion to join Joshua as a necessary party. Attorney Powell objected on the bases that he had not had a chance to review and research the motion, and requested the opportunity to respond to the Hearing Officer later in writing. Attorney Best said that the motion was a formality to bring to attention the fact that Joshua is now 18 years of age. Attorney Best also renewed her motion to join Andover which the Hearing Officer had previously overruled.

Attorney Powell objected to Attorney Best's intent to call all of the school district's witnesses or any witnesses on the basis that her list of witnesses did not include a summary of their testimony as requested of both parties by the Hearing Officer. Attorney Best's response indicated that the only witness to be called by the parent is Dr. Terry and his testimony is summarized in parent's exhibit #9 in the form of a letter from the school district's attorney. Also, that they are calling the same witnesses as the district and their testimony is summarized by the district. She will be seeking the same testimony as indicated by the district. Attorney Best indicated that she did not know the people in the district and who is in charge of various matters. She said that she does not feel there are any surprises.

The outcome of this discussion was the decision by the Hearing Officer to uphold the objection of the school district to the parent calling the school district witnesses provided that were provided 5 days prior to the hearing. Any witnesses called by the district can be cross-examined by the parent. In response to a request by Attorney Best, Attorney Powell identified the witnesses on the school district's list that he intended to call. Attorney Best requested that she be permitted to call those named as parent witnesses since they are all present and there would not be an imposition and she would not be limited just to cross-examination. Attorney Powell's objection to this request was sustained by the Hearing Officer. Attorney Best asked that the record show that being limited to cross examination and not being able to present the witnesses even though they are here would be prejudicial to her client's case. Attorney Powell stated that he would relieve the issue by withdrawing his objection and allowing Attorney Best to call the witnesses that he had indicated would testify. Those witnesses were identified as: Bob Coleman, Carolyn Moncivais, Terry Bachus, and John Updegrove. An extended discussion ensued about the parent calling witnesses identified by the school district, with a

particular focus on Sam Spaght, an Assistant Superintendent. Attorney Powell continued to object on the grounds that Attorney Best had not provided a summary of the testimony the parent was seeking, even in general. The Hearing Officer sustained the objection, thus limiting the witnesses the parent could present in direct testimony, and in rebuttal, to the previously identified witnesses.

In her opening statement for the parent, Attorney Best said that the Wichita school district, by board policy, has a more liberal residency policy, a more liberal enrollment policy than the State guidelines. She said that Ms. O. walked into the district offices in November, Joshua had already been in the school district all his life. The school district knew right away where Ms. O. lived. There was never any residency issue raised. They were raised in January only in the midst of these proceedings. She said if Joshua were not in a residential placement he would be at 144 s. Sheridan right now. He was in the school district the prior school year with an IEP that was in force until 11-18-95. The school district had dealt with his father before, they had had involvement with his mother. They had talked with a private school he was in the Fall of 1995, and had talked about here severe he was and recommended residential. When mother went into the district for residential, at that point, the district wanted no part of Joshua. Attorney Best said that there was no triggering event in November of 1995 that led Joshua not to be a resident of Wichita public schools. She concluded that with their open enrollment policy and their liberal enrollment policy, Joshua should be found to be a resident of this school district.

For the school district, Attorney Powell said that a lot of facts will not be in dispute, he believes, in this case. One fact is that Ms. O. does not live in the district. Another fact is the father does not live in the district either. Ms O. provides support for Joshua and, as of November 20, if Joshua had attended USD 259 schools she was going to provide that

support. There is apparently no dispute that Joshua lived at 144 S. Sheridan with his sister. Neither Joshua's sister or his grandmother acted as a parent. Attorney Powell said that the Kansas statute has two prongs. One is living with a parent in the district. Both parents lived outside the district so that prong is not met. Two was legal guardian, and there was no legal guardian situation. Three is a person acting as a parent. A person acting as a parent is either a person who has care and control of the child and provides a majority of support for the child and that's not the situation here. A second part of the acting as a parent is that a person within the district has actual control over the child and written consent has been provided by the parent or legal guardian to that person. Attorney Powell said it was made clear that Ms. O. was going to make all of the educational decisions regarding Joshua. He said that Sowers school staff met with Ms. O. on November 20, after she had phoned for a conference to reenroll Joshua. He said that Joshua left the district on January 27, 1995, and did not and has not attended a district school since then. There was one meeting of Ms. O. and Bob Coleman, and at that time a meeting was set up with a group of the staff at Sowers to discuss a placement for Joshua. He said that Ms. O. gave an address on sport of Kings which is a Wichita address. Attorney Powell said that, based on that, the staff made an incorrect assumption that Ms. O. resided within USD 259. He said that Mr. Coleman will testify that had he realized that Ms. O. did not live within the district that procedure calls for him to call the Executive Director of Special Education, Terry Bachus, and that decision would be made by Terry Bachus. He said Mr. Bachus's testimony is going to be that if he had been called on that day he would have taken the position that the education of Joshua was not the responsibility of USD 259.

Attorney Powell commented on several cases cited in the parent's brief and said that they are not germane, and that the issue for this hearing turns on Kansas statutes and USD 259

policy 5506. Attorney Powell elaborated on the *Catlin v. Sobol* case noted as exhibit H in the parent's brief. He pointed out parallels and differences in this case and the matter in hearing. Attorney Powell concluded by giving his view his view that the decisions in administrative hearings should be based on the interpretation of exiting statutes and policies. Attorney Powell wished to provide materials pertaining to cases in Kansas which speaks to the responsibilities of the hearing officer. Attorney Best objected on the grounds that these materials were not a part of the disclosure documents. Her objection was sustained by the Hearing Officer.

In beginning the presentation of witnesses, the parent called Dr. Patrick Terry as its first witness. Dr. Terry is the Superintendent of Schools in Andover, USD 385. In response to questions from Attorney Best, Dr. Terry testified in regard to parent's exhibit #9. He said that, 144 S. Sheridan is not within the boundaries of the Andover school district; Joshua w. has not resided within USD 385; he is not familiar with the open enrollment policy of the Wichita public schools; Sport of Kings is within the Andover school district boundaries and has a Wichita mailing address. An objection was raised by Attorney Powell to a question by Attorney Best about students living in the Andover district who are being bused to Wichita schools, on the grounds that it was beyond the scope of exhibit #9 which determined the limits to the testimony the witness can give. The Hearing Officer sustained the objection. There were no questions on cross examination or by the Hearing Officer and the witness was excused.

Mr. John Updegrove was called as the next witness for the parent. Mr. Updegrove is the Supervisor of Pupil Accounting for the Wichita School District. Mr. Updegrove first testified about school district exhibit #9, a map of USD 259. Mr. Updegrove testified that, the maps are printed and distributed to schools upon request; he was never involved in

a decision regarding Joshua W.'s residency; it is possible that he could get a call from a school employee about a student's residency in cases where the child lives in the district but does not live with a parent; a parent would have to request the map; a parent, without the map, would not know the boundaries of any one school district; employees in his office utilize a larger map with the boundaries highlighted, and a computer program to determine whether an address is within the boundaries highlighted, and a computer program to determine whether an address is within the school district boundaries; it would take about 10 seconds to punch an address upon the computer. Mr. Updegrove was then shown school district exhibit #3. In response to questions from Attorney Best, he testified that, he had not seen the document before; the address on the document is 14221 E. Sport of Kings; it would have taken about 10 seconds to determined that this address is not in the Wichita school district; he does not have anything to do with State aid; the school district is reimbursed based on its September 20 enrollment; the September 20 date is the reason the board enrollment policy is based on the September 20 date; one of the district's objectives is to get as many students enrolled by the September 20 date as possible because of the State aid received; he was not contacted on November 20 in regard to Joshua's residency or that of Ms. O. Mr. Updegrove was asked to testify about Board policy 5506. Attorney Powell objected on the grounds that this is outside the summary he provided about the testimony of Mr. Updegrove. The objection was overruled by the Hearing Officer. Mr. Updegrove testified that, he is aware of the non-resident enrollment and admission board policy 5506; the intent of the funding and enrollment policy is that if a student resides outside of USD 259 and seeks to enroll in Wichita schools, then with the approval of the principal of that site will allow enrollment prior to September 20, and not charge that student tuition, there have been times that a student who

enrolls after September 20 is charged tuition; it's possible to waive the tuition but they would have to go through Sam Spaght; at this point he cannot say how many students from outside the district were enrolled prior to September 20; a student who lives on Sport of Kings could attend Wichita schools if they asked; they school principal would be the person to inform a student about Board policy 5506; the policy does not address who contributes to the child's support; the policy provides the opportunity for students who may have moved to the suburbs to continue to attend Wichita schools if they wish; the basic policy is a student has the right to attend schools in a unified school district according to the address of the parents of lawful custodian. When it gets into living with a brother or sister, then we have to get into those issues, this means who has custody, who has residency, who is the person acting as the parent, where do they live, where does the parent live; he does not know if this type of investigation was done in Joshua's case. Attorney Powell objected to a question from Attorney Best as to would there ever be situations that you are aware of where the district denied the open enrollment of a student who was actually living with Wichita. The objected was sustained by the Hearing Officer. In responding to further questions from Attorney Best, Mr. Updegrove said that, there are about 47,000 students enrolled in the Wichita district; he has never met Joshua.

On cross examination, Mr. Updegrove testified that, he highlighted the boundaries of the school district on the school district map; he also located the Sport of Kings address; he located it on the map and also grove out to see it; 14221 Sport of Kings is outside the boundaries of USD 259; the address shown on district exhibit #3 is a Wichita address; the term open enrollment policy is a true statement prior to September 20, but not after September 20; enrollment of students outside the district after September 20 is allowed only when there is a severe hardship or very unique

circumstances; it is outside his area of authority to decide on whether there is a severe hardship or unique circumstances.

In response to questions from Attorney Best on redirect Mr. Updegrove testified that, he cannot answer the question of what are severe hardships or unique circumstances; he does not really know the exceptions are; he remembers a case judged to be severe hardship or unique circumstance some years ago but he does not recall the details. Mr. Updegrove was excused from further participation in the hearing.

Attorney Best called Mr. Terry Bachus as the next witness for the parent. Mr. Bachus is the Executive Director of Special Education for USD 259. In response to questions from Attorney Best, Mr. Bachus testified that, he has never met Joshua; he does not believe he has ever met Mr. O.; in regard to district exhibit #2; Board policy 5506, he makes the decision on admission and enrollment for special education; Dr. Spaght handles the regular education side; he does not believe there is a difference in the way the policy is applied between regular education and special education and that he is the only person on the special education side so there will be consistency; he cannot answer as to the purpose of the policy, his role is to enforce the policy; the latest revision of the policy was August, 1996; the policy liberalizes the strict residency requirements of the State until September 20; the only waiver after September 20 would be emergency situations; he has never authorized a waiver after September 20 because he has never had a situation where he had been asked. Under current State statutes the district of residence is responsible to deliver the services on the IEP, and he would see no reason to take over the responsibility of another school district; that a student whose parents moved out of the district could be served through the end of the semester, the school district of residency would be billed for tuition only if there was a contract with the Wichita district; there was nothing of this sort done with the Andover district in this

case; the director of special education for Butler county called him prior to January inquiring about Joshua; he told the Director, Mr. Bussey that Wichita did not consider him a resident and he was considered a resident of their district; neither he not any one he knew sent a note to the parent notifying her of this decision; he had the awareness that the mother's current residence was not within the Wichita school district; he received the information through the building principal, Mr. Coleman; He told Mr. Coleman that unless there was a contract for services with Andover, the Wichita district would not serve Joshua; there are not documents that he generated regarding his decision; he did not communicate information about Board policy 5506 to the parent; he believes that Mr. Coleman communicated the information properly to the parent; the responsibility for accepting an application for admission under the Board policy in the Principal"; the application is typically verbal; he would not let Joshua finish the semester because at the time; he was not in the district; when the parents of a child in special education moves out of the district, typically service is ceased and we notify the parent we're going to go that and then its up to the parent to contact the district in which they reside to tell them the child's going to be enrolled; if a student in special education were in his senior year and his parents moved out of the district he would contact the district in which the parent now resides to determined how they wish to handle the situation; he did not check into who had legal custody of Joshua; a child would not be considered a resident if the parent with legal custody moved to a state like New York and the child lived with the other parent who did not have legal custody; the social worker of the building to which the child is assigned typically has the responsibility for collecting documents of custody, etc.; he does not have a definition of severe hardships or unique circumstances; if the parent does not reside within the district, he does not approve special education placements, period; he does not know if

this is true of regular education students; he can not speak to whether the Board policy if money-based; he does not feel he was being asked for a waives when Mr. Coleman came to him and said there was a residency problem; special education students cost more than regular education students; the cost difference was not the reason for turning them down out-of-hand, the State statute makes the district of residence responsible; there are 3 to 4 being charged tuition for special education services; it is the district of residence's responsibility to offer a contract; the district occasionally contracts with other school districts to provide special education services; the district contracts with private agencies to provide services; he would not be surprised to know that Joshua is 18 now; he does not believe his practice is out of kilter with board policy but it is possible; an IEP is effective for one calendar year, in reference to parent exhibit B-3, Joshua's IEP start date is 11/18/94 and the end date id 11/18/95; the statute does not indicated that who owns the house or pays taxes on it is used in determining residency; he verified that Ms. O.'s address was outside the district from a printout in his office; in regard to school district exhibit #4, STUDENT INQUIRY form for Joshua, the address shows as 144 S. Sheridan; 10/5/94 is shown as the exit date for Joshua; he has never seen an enrollment form for Joshua; he talks directly with Mr. Coleman; a part of the purpose of the Board policy would be to provide continuity for the student and another part might be to collect money from non-resident students and to increase the number of students prior to September 20; 18 year olds who live in the district legally become a resident; now that Joshua is 18, and if he legally lived in the district, the district would be obligated to develop an IEP for him and serve him; payment for a residential placement would be made only if the staff at Sowers determined that it was an appropriate placement; he does not know if he has an opinion on the dichotomy between having an open admissions policy versus the State

policy that says the child resident where the parent resides or a person in place of a parent [ending unintelligible on the tape]. His intent is to enforce the State statute as we interpret it and respond to the Board policy as we interpret it; he really does not have a clue as to just when he talked with Mr. Coleman; he does not recall a conversation, and does not know that he had it, with Mr. Coleman in which Mr. Coleman told him that he had talked to one of the people at Kemper, a private school where Joshua had been attending in the Fall just prior to this enrollment in the district, and that that person had recommended to Mr. Coleman that Joshua needed residential placement; even if he had had the conversation it would still be a multidisciplinary team's responsibility to determined whether or not they agree with it, whether or not residential services are required; it would not be a reasonable step to immediately call a multidisciplinary team together unless the student is a resident; he did not ask Mr. Coleman the sequence of steps.

A recess was declared for lunch.

Upon reconvening the hearing after lunch, and in response to questions from Attorney Powell on cross examination, Mr. Bachus testified that, in regard to school district exhibit #4, the program information speaks to entrances and exits from special education programs, in regard to parent's exhibit B-3, it is the IEP plan page specifying the exceptionality and related services and the start and end dates for Joshua; exhibit #4 shows that Joshua exited the district January 12, 1996; exhibit #4 shows that he entered the district on November 20, 1995; the exhibit #4 shows that Joshua was not in the Wichita public schools between January 27, 1995, and November 20, 1995; when a student leaves the district, the district no longer provides the special education services; if Joshua had not been residentially placed after November 20, but had attended Sowers and no one had caught the fact that his mother lived outside the district, and three weeks later it was found out,

the district would have terminated services because he did not meet the Board policy on the September 20 date, he would not have met the Board policy on the November 20 date, we would not have felt obligated to continue the services because he was not a resident of the district; in regard to district exhibit #2, item No. 2 refers to a child who is enrolled prior to September 20; KSA 72-8233 refers to the contracting of services which means contracting with other school districts to provide services within our district for a student who is a resident of another district; a contract for services would be accepted if the area in which the service is desired is full; Joshua would not be able to attend USD 259 under paragraph 7 of Board policy 5506 because he was in the 9th grade as of 11/20/95 and paragraph 7 requires that he be in the 11th grade; Joshua would take advantage of the services of the district now that he is 18 by returning to the district, enroll in school, then we would pull together a multidisciplinary team to determined what types of services Joshua would require; if Joshua were to ask for a determination to be made as to whether residential services were needed, that determination would be made; in regard to district exhibit #1, an affidavit from Ms. O., paragraph 3 , Joshua was not in attendance in Wichita schools on March 1, 1995, when Ms. O. moved to Sport of Kings; in regard to exhibit #10, he does not know who put return to sender, wrong address on the envelope; it is his understanding that the mother lived outside the district; it is his understanding that the mother was providing support for Joshua; it is his understanding that Joshua was living within the school district; he did not know who the person Joshua was residing with; it was his understanding that the person was not acting as a parent; he would not have considered the case an extreme hardship.

On redirect questioning by Attorney Best, Mr. Bachus testified that, he found out what KSA 72-8233 means by reviewing it over the lunch hour, he reviewed his testimony

with Attorney Powell but others were in the room; he did not use any of the affidavit information in reaching his decision or cause him to reconsider his decision; in regard to district exhibit #4, information about Joshua's attendance at Kemper is not on the Student Inquiry form because it is not a district facility; the Youth Residence Hall is operated by the County but the district provides the classroom teachers for that facility; any special education services as deemed appropriate by the IEP are provided by the district while in the Youth Residence Hall; he does not personally supervise the Youth Residence facility as part of his duties; he did not look into the reasons Joshua is a 9th grader at the age of 18; the fact that Joshua is a 9th grader at the age of 18 would not have anything to do with his decision on residency; he does not know why January 12, 1996 was picked as the exit date; the form is for the purpose of providing information to the building when the child changes building within the district; Patricia Kohl (?) is a psychologist; he did not contact Patricia Kohl in making his decision on Joshua; he does not know where Joshua was on March 1, 1995 when Ms. O. changed residencies; if he was in the Youth Residence Hall it would be on the Student Inquiry form; Joshua has been in lock-up twice which is associated with some type of criminal activity which is different from the type of residential placement being talked about; the Youth Residence Hall is a residential placement; he does not know what Kemper is. Ms. Bachus was excused as a witness.

Ms. Carolyn Moncivais was called as the next witness for the parent. Ms. Moncivais is a school social worker at Sowers High School. In response to questions from Attorney Best, Ms. Moncivais testified that, Sowers is a special education school in the district; she first became aware of Joshua in Fall, 1994; she has had no contacts with Joshua; her role in determining a student's residency in the district is just to make certain that they are a resident in the district; she did not make any decisions as to Joshua's residency; she was

present the day Ms. O. came in to register Joshua; she had not talked with Ms. O. before that time; she was aware that Ms. O. was seeking a residential placement; there was no statement to Ms. O. at the meeting that Joshua was not a resident; Joshua was enrolled at Sowers because prior information said that was the school he was to be assigned to; in cases of divorce a part of her responsibility is to determine who is the rightful custodial parent; she does this usually by asking the parent that accompanies them and then if there is a question asking for documentation of divorce papers; in Joshua's case they asked Ms O. if she was the custodial parent and we took her word that she was; none of that was a problem at that time; she gathers custody papers but not in every case; Ms. O. told them that she lived on Sport of Kings and that Joshua did not live with her but lived with an older sister.

In response to questions from Attorney Powell on cross examination, Ms. Moncivais testified that, a decision on residential placement was not made at the multidisciplinary team meeting because they were not at that point and did not have enough information to make the determination; the plan to make that determination was to contact agencies Ms. O. indicated would have information and would review the records and get back with her; it was hoped that Joshua would begin school immediately so they could do some observation; she had difficulty contacting Ms. O. and eventually spoke with her on December 12 and was told that Joshua was in a program in Tennessee; Ms. O. did not ask her to pursue a placement of that point but said the matter was in due process hearing and gave her the name of her lawyer; she assumed that the address Ms. O. gave was a Wichita address because is said Wichita, 67230; she, Mr. Coleman the principal, Mr. White the psychologist, Mr. Henderson the counselor, and Ms. O. were present at the meeting on November 20; to her knowledge there was no

mention at the meeting that Joshua might attend Three Springs.

In response to questions from Attorney Best on redirect, Ms. Moncivais testified that, at the meeting on November 20 no on asked Ms. O. to sign a consent for a new case study evaluation; she is not aware that anyone sent Ms. O. a letter or notice that the meeting on November 20 was a multidisciplinary conference that the district prepared; when she spoke with Ms. O. on December 12, no one in the district had told her that they would deny service because Joshua is not a resident.

In response to questions from Attorney Powell on re-cross, Ms. Moncivais testified that, there was no decision made at the meeting on November 20 to do a comprehensive re-evaluation of Joshua for purposes of the IEP. Following several impromptu questions from both parties, Ms. Moncivais was excused.

Mr. Robert Coleman was the next witness for the parent. Mr. Coleman is the Principal of Sowers School. In response to questions from Attorney Best, Mr. Coleman testified that, he does not recall the exact date he first talked with Ms. O. in the Fall of 1995, he got a telephone call from her in November, prior to that he had received a call from Kemper Military Academy regarding Joshua; when Ms. O. called she indicated that Joshua was discharged from Kemper and could not continue there; Ms. O. told him that according to Kemper Joshua was discharged based on conversations Kemper had with the school district about Joshua; he is not aware that Kemper also talked with Patricia Kohl (?) of the school district, but Ms. O. mentioned that to him; he was not aware that Kemper was recommending residential placement; Ms. O. said that she wanted a residential placement for Joshua and he told her that before they could consider that they needed to get him enrolled; Ms. O. came in and enrolled Joshua on Friday afternoon, November 17; he was not aware on the 17th that Joshua did not live with

Ms. O. because the address he had was the one he had when he enrolled before; he became aware that Joshua did not live with Ms. O. on the 20th at the meeting when she filled out the release forms; the only record of placement IEP the district had for Joshua indicated a special day school which would have been at Sowers; he offered to send a cab to transport Joshua to Sowers until bus transportation could be arranged; he was not aware of a residency conflict until they were in the due process hearing; he did not ask someone to punch the computer to see if the Sport of Kings address is in the Wichita school district; he does not consider Joshua to be a resident at this time because he does not live within USD 259, his mother does not live within USD 259 and she is the custodial parent as he understands it; during the years Joshua lived with his father, the father was considered the custodial parent because the father was responsible for taking care of him, his father was the one who signed the due process papers and the IEP at the time; financially he had no idea what was happening and it would not necessarily have made a difference. Additional questions were asked by Attorney Best about what Joshua's residency would have been in March 1995, Summer, 1995 and October, 1995, and about Board policy 5506.

On cross examination, Mr. Coleman responded to questions from Attorney Powell and testified that, he first became aware of the residency conflict after it came under the hearing process in early to mid December; he did not provide Ms. O. with Board policy 5506 because of being in the hearing process and Attorney Powell or Mr. Hartke would have that responsibility. At this point there were no further questions and Mr. Coleman was excused.

Ms. Anita O. was the next witness. Ms. O. is the mother of Joshua W. In response to questions from Attorney Best, Ms. O. testified that, Joshua last lived with her in 1988; she did not see Board policy 5506 until yesterday; at some point in Fall, 1995 Joshua was in a private residential facility

called Kemper; Mr. Early (?) at Kemper told her that because of his conversations with Mr. Coleman and Patricia Kohl (?) he felt that Kemper Military did not have the adequate program for Joshua and said that he needed a special residential education; Mr. Coleman was aware that special residential placement was being requested; Mr. Coleman told her to come in and enroll Joshua. This was on November 17; Mr. Coleman told her to come in for a conference on November 20 whose purpose was to come up with a game plan, to talk about whether or not special education would be appropriate, kind of review; that they were going to talk about whether or not residential was appropriate, what the game plan would be to get to there; at the conference they talked a lot about Joshua's problems at Sowers, where he has been; no one asked her to produce any kind of proof of custody, guardianship or anything like that; until the end of October, 1995, Joshua's father lived in the house on Sheridan when he moved out of the house, out of the district, to someplace else; the district indicated no problem with transporting Joshua from the Sheridan address rather than Sport of Kings; that she would have done the paperwork they would have asked her to do if the district had indicated a residency problem because Joshua did not live with her, but there was a system for requesting a waiver; Joshua has never lived at Sport of Kings; at the end of the meeting on November 20 she remembers the last option that the district gave her which was that he could come to Sowers and spend the whole day there, the Carolyn and Bob and Mr. White left, leaving Ken Henderson and the last option, he said that he didn't think Joshua could make it at Sowers, that he could be willing to let him come in two hours a day, get his GED, and that he had been in the prison population and that maybe that what he needed was prison to straighten him out and that was not an option in her opinion; it was after the meeting on the 20th that she placed Joshua in Three Springs; she found Three Springs through an educational consultant she had

found through Kemper; if Joshua came home today he would be living at 144 S. Sheridan; Joshua has severe emotional behavioral problems and that he was a disabled child that she could not handle.

In response to questions from Attorney Theis on cross examination, Ms. O. testified that, up until March, 1995, her address was 2181 N. Riverside Boulevard; she knew her new residence of Sport of Kings was in the Andover school district; Joshua was a student at Sowers in November, 1994; When Joshua exited the district in January, 1995 he lived in Larned at Larned Youth Facility for about 6 months; upon Joshua's release from Larned he returned to Wichita and resided either at 300 S. Winterset or 144 S. Sheridan; immediately prior to November 20, 1995, Joshua lived at Kemper Military Academy; her affidavit, school district exhibit #1, states that on November 20, Joshua lived at 144 S. Sheridan; Joshua was physically in attendance at the house at 144 S. Sheridan on a repetitive basis, and could be found there; she placed Joshua at Three Springs on November 21; she applied to Three springs on November 3, 1995; it was her intention to enroll Joshua at Three Springs, or someplace, she had made several applications; Joshua physically got to Three Springs by her taking him; she picked Joshua up at Kemper on November 21, and took him to Kansas City airport; she accompanied Joshua to Three springs; she does not recall whether she purchased the airline tickets before the 21st or at the ticket counter on the 21st; Joshua was at Kemper on November 20, 1995; the transportation arrangements made at the conference on November 20 was to pick up Joshua at the address at 144 S. Sheridan; she said that the address on Sheridan is where she told the school district people at the conference on November that Joshua would be staying; Joshua was not at 144 s. Sheridan on November 20. He was at Kemper Military School.

On redirect questions from Attorney Best, Ms. O. testified that, actually, Joshua was being ejected from Kemper; on the 20th he was coming out of Kemper no matter what; she had already requested residential; Kemper was recommending residential special education; Kemper had already discussed residential special education with the district; picking Joshua up at 144 S. Sheridan was one of the options; at the meeting on the 20th the staff at Sowers expressed some concerns about Joshua making it at Sowers; as she remember it, Carolyn said that most kids at Sowers had a honeymoon but that Joshua had never had a honeymoon, and that Ken Henderson said that maybe jail oughta be the way to go, and she thinks Bob Coleman said something about, that Josh had been a difficult child; that Bob told her that her believed by what he could remember of Joshua's behavior that he was behaviorally handicapped, so from what she was getting from the discussion with the people that already knew Josh, that that [residential] was really where they wanted to see it go; that money was the holdup, who was going to pay for it, that was the whole deal; she does not remember if the district asked her to sign a consent to do a re-evaluation of Joshua; they told her to join in a parent support group and get a lawyer because that is part of due process; she had made financial contributions to Joshua prior to November 20, 1995. On recross examination questions from Attorney Powell, Ms. O. testified that, Bob Coleman told her that she ought to get a lawyer. He was talking about what her rights are under due process; she does not know that he told her to get an attorney in case she disagreed with the recommended placement of Joshua; he just told her to get an attorney; she remembers the words due process; probably she told them at the meeting on November 20 that Joshua was at Kemper Military Academy in Missouri; she does not recall whether she did or not tell the district at the meeting on November 20, that Joshua was at Kemper Military School in Missouri; she remembers the

discussion that they would offer to pick Joshua up; they did not get to the point of making the arrangement to pick Joshua up so, no, she did not tell them that they wouldn't be able to pick him up because he wasn't living there; after the got done with Ken Henderson she did not have any intention on that date of Joshua attending Sowers; if she could not find another placement prior to November 20, she would have had the intention of sending Joshua to Sowers; she honestly does not recall whether she found out prior to November 21 that Three Springs would be available; she does not remember when she bought the tickets for the plane they missed; she does not remember if she bought the tickets before or after the meeting on the 20th.

In response to questions from Attorney Best, Ms. O. testified that, she believes Joshua had been at Charter in July; that she was providing the staff at the meeting with information with every placement that she knew about, because she didn't care; Mr. Coleman was present and had acknowledged [in his testimony] that he had talked with the Kemper people; she would have definitely considered a residential placement for Joshua if the district had offered it at the meeting on November 20, depending on what it was; they did not offer any residential placement.

In response to questions from Attorney Powell, Ms. O. testified that, on the 20th there was some discussion that they would need to further evaluate Josh and Josh's situation before they made a final decision on his educational placement; she signed several forms on November 20 so they could get more information so they could make an evaluation; definitely, on that date it was obvious that they had not completed the evaluation process.

In response to questions from Attorney Best, Ms. O. testified that, in actuality the forms they gave her were release forms; she does not recall seeing any document that is a form where the district said; we want to do a case study, sign this; that it is his [Attorney Powell?] spin on what you

signed; she does not recall any case study evaluation or reevaluation forms.

In response to questions from the Hearing Officer, Ms. O. testified that, she does not remember if the issue of Joshua's father moving out of the home at 144 S. Sheridan ever came up at the meeting on November 20; Joshua's father acting as Joshua's legal custodian in signing papers such at the IEP met with her approval; she probably would have put Joshua in the Tennessee facility even if the issue of his residency at been brought up at the November 20 meeting because at that point in time she needed to find a place for Joshua.

In response to a question from Attorney Best, Ms. O. testified that, she does not remember whether at the meeting on November 20 the school district asked why the father had signed the IEP's up to that date but why he wasn't there and whether they showed her Joshua's current IEP which had his signature on it; [she does not believe?] that they asked her to sign an IEP to allow them to put Joshua in Sowers; she didn't sign an IEP last year. In response to a question from Attorney Powell, Ms. O. testified that, on November 20 the dad was living outside USD 259; she made it clear to the Sowers staff at the meeting on November 20 that she could be making the decisions regarding an educational placement for Joshua because the dad had moved and it was no longer his place to make them; the decisions on Joshua's education were with her on November 20.

Ms. O. was excused from further participation as a witness. This concluded the parent's direct presentation of evidence and testimony.

Attorney Powell said that the school district had nothing further to present.

Attorney Best said the parent has no rebuttal witnesses except those who are not here who are on the list.

In her closing position, Attorney Best stated that it is the parent's position that Joshua had been a resident of this

school district throughout this entire school year, since November, the date in question. He was a resident before November. The fact he was in a private school doesn't mean that he didn't have a home in the district. In her opinion the case shows in that the district has a very broad policy for accepting out-of-district students if the money is right and there is an advantage to it. If the child is one who has special needs or is a special education student like Joshua the district can easily deny services to the child and that's what they're using this residency policy for. We have a district whose Board has enacted a rather liberal open enrollment policy. If the district had told the mother there is a residency problem and here is a copy of the Board policy she would have done everything to make sure that she applied for any kind of a waiver. That never was presented to her and the district acknowledges that. Joshua is 18 now. The district also testified that at age 18 he can decide his own residency. His affidavit is in here saying that he is a resident of the school district. The school district did not take any steps if it truly believed he belonged to Andover to enter into any kind of contractual relationship with Andover, or to notify the mother in writing that we have made a decision on residency and here are your options. One district staff said that he made the decision by himself but Mr. Coleman said he never took it to Mr. Bachus. Joshua should be granted the rights due him under special education. The intent of congress in passing IDEA it to provide services to special education students, to have districts actively seek out and serve these students. If this district thought that they have to serve this student they should have decided it right then.

It would have taken 10 seconds to punch in the Sport of Kings address and find out that it is not in the district. They didn't do that because they thought let's put him at Sowers and see what happens. When the cab shows up maybe he'll go and maybe he won't. It hasn't worked before but nevertheless that's the placement. When they found out that

residential was at stake and the parent intended to pursue that, then in January the district determined that no he's not a resident in order to avoid any responsibility to Joshua. But there are various ways Joshua could have established residency in the district even if the district's argument that Ms. O. is not a resident were true. So, he should have had the right to have that explained to his parent and he should have had the right to apply for those waives. But to withhold that information from a parent and then say, well, you know, you have no options, six months later or however many months later makes no sense. We also heard conflicting testimony about whether a student can continue or cannot continue for a semester, can continue for the entire year once they are in the district. The district also never addressed the fact that what happens if a private school student returns to the district after September 20 and enrolls in the district and misses that timeline. What are their rights. There are various issues, factual issues that need to be resolved in order to decide this case. It is not an easy case. It doesn't follow the statute but that's typical of most states. A lot of states have very restrictive residency requirements. In Kentucky for example the requirement is that the child sleep in the district. That eliminates every residentially placed student. So that hasn't held in court cases. You have to look at the benefit to the child and what is in the best interests of the child. It is best for the child to find out retroactively that you are not a member of the district because you need residential placement. That isn't fair and that isn't the intent of Congress. She believes that the evidence shows and there is enough reason and enough meat and potatoes in that district Board policy that would have allowed Joshua to remain a district resident throughout this entire school year. There was no intent to change his residency, he lived there with his sister, there was no difference in where Ms. O. lived, as of November of 1995, there was no difference in the amount of support she paid for his benefit. The difference is that his

father no longer lived there, but his adult sister did and it was a family home. All of these factors [should be weighed?] in reaching your determination and we ask that you find that Joshua is a resident of this school district.

In the district's closing statement, Attorney Powell said that he would be real short. He thinks that we are sort of mixing apples with oranges when we talk about where Joshua resides or where he doesn't reside when you look at the Board policy 5506. The Board policy in regards to the open enrollment period that occurs prior to September 20 doesn't talk about where the student resides or where the student doesn't reside. It talks about that the student may be enrolled in unified school district 259, so to have the open policy its not whether or not he's a resident attending a private school it is a question of whether or not he is an enrolled student in USD 259, so clearly Joshua was not enrolled at Fall semester of 1995 prior to September 20 was not a student enrolled under the open enrollment policy of this district. He did not enroll or attempt to enroll until November 20. On that date it's clear now that his mother did not reside within the district. Its clear that she had legal custody of him on that date, and its clear that she had responsibility for his educational decisions. And, it's also clear that his dad did not have responsibility for those educational decisions on that date, and he also did not live in the district. Its clear that on that date he was not living with a parent or with a person acting as a parent under the statutes, so he did not fall under the statutes. Under Board policy if you attempt to enroll after September 20, it is not a broad open policy. By the word in the policy it is very clear that it is very limited right, and that limited right is it's a severe hardship or very unique circumstances, and in this case its clear that there was no severe hardship or very unique circumstance under the district's definition and under the way the district has handled that policy in the past that would have allowed Joshua to enroll in the district. On September

20 he was allowed to enroll in the district under a mistaken believe, and its not anything. Ms. O. did, that the staff at Sowers when they saw the Wichita address they made an assumption that that was Wichita, and when the problem was found out it was brought up as an issue in this case. He thinks it is clear through Terry Bachus's testimony that if he would have stayed at Sowers and this had been discovered at a later date that the same results would have happened. It's just that in this case a due process proceeding was instituted prior to the time the district found out that Joshua was not a resident. So, we didn't treat it any differently than we would have if he had been a resident of the district, and again its the parents burden of proof to show that we did, and there has not been any evidence that's been presented to show that we treated Josh any different in taking the position that he was not a resident of the district. In conclusion, he's not a resident of the district. He did not enroll until after September 20, or attempt to enroll, he enrolled November 20, and under our very narrow policy that applied to enrollment after November 20, he did not fit a severe hardship or unique position. Again, that, as is as pointed out in the brief, that's a district decision that the district should be allowed to make, and its not a decision that should be made ad hoc by a hearing officer. The hearing officer can look at the decision made by the district, but the hearing officer should not substitute under Kansas law his judgment for that of the school district. That should be a school district's decision and that's the decision that was made.

The Hearing Officer stated his responsibility to consider the evidence and testimony presented at the hearing in reaching a decision, and that he had 10 days within which to do so, including weekends. Once the decision is reached within the 10-day period, he explained that he has 24 hours within which to make it available to both parties. He said that neither party has the right to appeal his decision. The timeline for appealing is within 30 days after receiving the

decision. The next level of appeal is the State Department of Education, through the State Commissioner of Education. Hearing no questions from either party, the Hearing Officer thanked those present for their participation and adjourned the hearing at 3:30 p.m.

APPENDIX I- CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS INVOLVED

20 U.S.C. Sec. 1400. Congressional statements and declarations

(a) Short title

This chapter may be cited as the "Individuals with Disabilities Education Act".

(b) Omitted

(c) Findings

The Congress finds the following:

(1) Disability is a natural part of the human experience and in no way diminishes the right of individuals to participate in or contribute to society. Improving educational results for children with disabilities is an essential element of our national policy of ensuring equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities.

(2) Before the date of the enactment of the Education for All Handicapped Children Act of 1975 (Public Law 94-142) –

(A) the special educational needs of children with disabilities were not being fully met;

(B) more than one-half of the children with disabilities in the United States did not receive appropriate educational services that would enable such children to have full equality of opportunity;

(C) 1,000,000 of the children with disabilities in the United States were excluded entirely from the public school system and did not go through the educational process with their peers;

(D) there were many children with disabilities throughout the United States participating in regular school programs whose disabilities prevented such children from having a successful educational experience because their disabilities were undetected; and

(E) because of the lack of adequate services within the public school system, families were often forced to find services outside the public school system, often at great distance from their residence and at their own expense.

20 USC Sec. 1415 (i)(3)(B) Jurisdiction of district courts; attorneys' fees

(B) Award of attorneys' fees

In any action or proceeding brought under this section, the court, in its discretion, may award reasonable attorneys' fees as part of the costs to the parents of a child with a disability who is the prevailing party.

28 USC Sec. 1254(1) Courts of appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

28 USC Sec. 1331 - Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. § 1343 (a)(3)

34 C.F.R. § 300.511

Kan. Stat. Ann. § 72-1046

72-1046. School residence; definitions.

(a) Any child who has attained the age of eligibility for school attendance may attend school in the district in which the child lives if (1) the child lives with a resident of the district and the resident is the parent, or a person acting as parent, of the child; or (2) subject to the provisions of subsection (c), the child lives in the district as a result of placement therein by a district court or by the secretary of social and rehabilitation services; or (3) the child is a homeless child.

(b) Any child who has attained the age of eligibility for school attendance may attend school in a school district in

which the child is not a resident if the school district in which the child resides has entered into an agreement with such other school district in accordance with and under authority of K.S.A. 72-8233, and amendments thereto.

(c) Any child who has attained the age of eligibility for school attendance and who lives at the Judge James V. Riddel Boys Ranch as a result of placement at such range by a district court or by the secretary of social and rehabilitation services shall be deemed a resident of unified school district No. 259, Sedgwick county, Kansas, and any such child may attend school which shall be maintained for such child by the board of education of such school district as in the case of a child who is a bona fide resident of the district.

(d) As used in this section:

(1) "Parent" means and includes natural parents, adoptive parents, stepparents, and foster parents;

(2) "person acting as parent" means (A) a guardian or conservator, or (B) a person, other than a parent, who is liable by law to maintain, care for, or support the child, or who has actual care and control of the child and is contributing the major portion of the cost of support of the child, or who has actual care and control of the child with the written consent of a person who has legal custody of the child, or who has been granted custody of the child by a court of competent jurisdiction; and

(3) "homeless child" means a child who lacks a fixed, regular, and adequate nighttime residence and whose primary nighttime residence is (A) a supervised publicly or privately operated shelter designed to provide temporary living accommodations (including welfare hotels, congregate shelters, and transitional housing for the mentally ill); or (B) an institution that provides a temporary residence of (c) a public or private place not designed for, or ordinarily used as, a regular sleeping accommodation for human beings.

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No. 00-502

IN THE

Supreme Court of the United States

JOSHUA W. AND ANITA O.,

Petitioners,

v.

BOARD OF EDUCATION WICHITA PUBLIC SCHOOLS U.S.D. 259, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT ANDOVER U.S.D. 385

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QUESTIONS PRESENTED

Respondent Andover U.S.D. 385 submits that the correct issue is whether the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.*, obligates it to provide Petitioner Joshua W. with a free appropriate public education even though he never resided in the Andover School District?

STATEMENT OF THE CASE

On February 1, 1996, petitioners sent correspondence to the Superintendent of Andover U.S.D. 385 requesting it be joined in a due process hearing against the Wichita Public Schools U.S.D. 259 "in the event that it is determined that [Andover] is ultimately responsible for Joshua Wilson." (Andover's Motion to Dismiss, Exhibit C.) On February 2, 1996, Respondent informed Petitioners that it would not join the pending hearing and that the governing rules and regulations regarding the right to request a due process hearing (K.S.A. § 79-972 *et seq.* and K.A.R. § 91-12-46 as well as 34 C.F.R. § 300.506) do not apply when a student is not enrolled in the district. (Andover's Motion to Dismiss, Exhibit D.)

It is undisputed that Joshua W. has never resided in the Andover School District; he has never been enrolled and he has never requested to be enrolled in the Andover School District. (Petitioners' Brief at 14.) It is also undisputed that Petitioners never asked Andover to evaluate Joshua W. or to prepare an Individualized Education Program (IEP) for him. (Petitioners' App. F at 39a.)

On April 14, 1997, Respondent filed a Motion to Dismiss the claims against them as well as a Motion for Sanctions.[1] In its June 10, 1997, Memorandum and Order, the District Court of Kansas granted Respondents' Motion to Dismiss holding that

> [d]ismissal of the present action would appear appropriate, since the complaint itself establishes

1. Petitioners incorrectly set forth the date this motion was filed as April 4, 1997.

> that Joshua has never resided in the Andover School District. Kansas law clearly establishes that the local institution responsible for complying with the terms of the IDEA is the local school district in which the student actually resides.

(Petitioners' App. F at 42a.) The Court denied Respondent's Motion for Sanctions based on its determination that the "facts at least provide some potential justification for concluding that the action taken against the Andover defendants was not undertaken for any improper purpose." (*Id.* at 44a.) Petitioners filed a Motion to Reconsider the Court's Order dismissing Respondents on June 24, 1997. In its Order of July 22, 1997, the Court denied Petitioners' Motion, holding that their claims against the Andover defendants were barred by their own admissions regarding Joshua's residency. (Petitioners' App. E at 34a.)

On August 12, 1999, Petitioners appealed the decisions of the District Court to the Tenth Circuit Court of Appeals. In a unanimous opinion affirming the judgment of the District Court, the Tenth Circuit held that Joshua W.'s residency controls the issue of which school district is responsible for his special educational needs. (Petitioners' App. A at 9a.) Because Petitioners never pled any residency in the Andover U.S.D., Andover could not be held responsible. (*Id.*) The Court also determined that Andover was "neither a necessary nor indispensable party for purposes of [Fed.R.Civ.P.19]." (*Id.* at 8a.)

REASON FOR DENYING THE WRIT

I. RESIDENCY CONTROLS THE ISSUE BEFORE THE COURT

Andover U.S.D. 385 has no obligation to provide Joshua W. with a free appropriate public education. Under Kansas law, residency with a parent who lives within the jurisdiction of the school district controls which school district is responsible for providing the free appropriate public education. *See* K.S.A. § 72-1046. The circuits are in agreement on this point. *Catlin v. Sobol*, 93 F.3d 1112, 1119 (2d Cir. 1996); *Neisz v. Portland Public School District*, 684 F. Supp. 1530, 1532 (D. Oregon 1988). It is uncontested that at no time has Joshua W. lived in the Andover School District or with a parent or person acting as a parent living the Andover School District. (Petitioners' Brief at 14-15.) Furthermore, because residency provides a limitation on the scope of a school district's duty under the IDEA, the Andover School District had no obligation to seek out and provide Joshua W. with assistance. *Susan R.M. v. Northeast Independent School District*, 818 F.2d 455 (5th Cir. 1987); *Hall v. Freeman*, 700 F. Supp. 1106 (N.D. Ga. 1987). The circuits are in agreement on this point as well. *Hooks v. Clark County School District*, 228 F.3d 1036, 1039 (9th Cir. 2000); *Smith v. Special School District No. 1*, 184 F.3d 764, 767 (8th Cir. 1998).

Based on the residency laws of the State of Kansas, the Andover School District owes no duty to Joshua W. or Anita O. and their writ to review the judgment of the United States Court of Appeals for the Tenth Circuit, affirming the Kansas District Court's judgment dismissing Andover as a party, should be denied.

CONCLUSION

Petitioners admit that Joshua W. never resided within the Andover School District. Petitioners' request for a writ of certiorari is limited to the issue of whether or not the judgment of the United States Court of Appeals for the Tenth Circuit, upholding the District Court of Kansas' judgment dismissing Andover as a party, was appropriate. The Kansas residency laws are clear: A child may attend school in the district in which the child lives if the child lives with a resident of the district and the resident is a parent, or person acting as a parent, of the child. K.S.A. 72-1046(a). There is no split in the circuits on this issue. Because Petitioners admit that Joshua W. did not meet this eligibility requirement, because Joshua W. has never been enrolled in the Andover School District, the Tenth Circuit's judgment dismissing Andover as a party to this action was clearly appropriate.

Respondent Andover U.S.D. 385 respectfully requests that the Petitioners' Writ of Certiorari be denied.

Respectfully submitted,

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(3)

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No. 00-502

In The

Supreme Court of the United States

JOSHUA W. and ANITA O.,

Petitioners,

vs.

USD 259 BOARD OF EDUCATION,
WICHITA PUBLIC SCHOOLS, et al.,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit

RESPONDENT U.S.D. 259's BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Whether Petitioners Failed To Prove Residency Under State Law As Required By The IDEA And Whether Such Claim Presents A Substantial Federal Question Meriting Review.

Whether Petitioners' Constitutional Challenge To The Kansas Residency Statute May Be Reviewed Where It Was Not Presented To The Courts Below.

Whether Parents Whose Uncooperative Conduct Prevents Local Educators From Making A Final Placement Decision Are Entitled To Equitable Reimbursement For A Unilateral Private Placement Under The IDEA.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 10

I. PETITIONERS' FAILURE TO PROVE RESIDENCY UNDER STATE LAW PRESENTS NO SUBSTANTIAL FEDERAL QUESTION 10

II. THE COURT OF APPEALS' CONCLUSION THAT PARENTS WHO OBSTRUCT THE IEP PROCESS ARE NOT ENTITLED TO REIMBURSEMENT FOR A UNILATERAL PRIVATE PLACEMENT WAS UNQUESTIONABLY CORRECT AND PRESENTS NO ISSUE MERITING REVIEW 14

CONCLUSION 20

TABLE OF AUTHORITIES

Page

CASES

Board of Educ. v. Rowley, 458 U.S. 176 (1982)..... 15

Clay T. v. Walton County Sch. Dist., 952 F. Supp. 817 (M.D. Ga. 1997) 15

Dubois v. Conn. State Board of Educ., 727 F.2d 44 (2nd Cir. 1984) 15

E.E.O.C. v. Fed'l Labor Relations Auth., 476 U.S. 19 (1986) 14

Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 (1993) 16

Murray v. Montrose County Sch. Dist., 51 F.3d 921 (10th Cir.), *cert. denied*, 516 U.S. 909 (1995)..... 15

Patricia P. v. Board of Educ., 203 F.3d 462 (7th Cir. 2000)..... 18

Sch. Comm. of Burlington v. Dept. of Educ., 471 U.S. 359 (1985)..... 16, 17, 18

Schoenfeld v. Parkway Sch. Dist., 138 F.3d 379 (8th Cir. 1998) 15, 18

Susan R.M. v. Northeast Indep. Sch. Dist., 818 F.2d 455 (5th Cir. 1987)..... 11

Tucker v. Calloway County Board of Educ., 136 F.3d 495 (6th Cir. 1998)..... 18

Vlandis v. Kline, 412 U.S. 441 (1973)..... 14

Wise v. Ohio Dept. of Educ., 80 F.3d 177 (6th Cir. 1996).....11, 18

TABLE OF AUTHORITIES – Continued

Page

STATUTES

Kan. Stat. Ann. § 72-1046(a) 11

20 U.S.C. §§ 1400 *et seq.* 11

20 U.S.C. §§ 1412(a)(10)(C)(ii) & (iii) 19

RESPONDENT U.S.D. 259's BRIEF IN OPPOSITION

Respondent U.S.D. 259 respectfully submits that the decision below correctly analyzed the facts and governing law, and that the Petition For Writ Of Certiorari, presenting no grounds for review, should be denied.

STATEMENT OF THE CASE

The controlling facts are set forth in detail in the opinion of the District Court and summarized in the opinion of the Court of Appeals. The Petition, however, largely neglects these controlling facts and contains numerous misrepresentations, omissions, and references which are not supported in the record. Significantly, the Petition makes no claim or showing that the factual findings of the District Court, upheld by the Court of Appeals, are erroneous but instead amply indulges in contrary assertions and accusations which petitioners describe as facts. Such a practice is not permissible and, as required by Supreme Court Rule 15.2, respondent presents the following supplemental statement of the case.

Joshua W. received special education from U.S.D. 259 for many years. Although making a challenge only to the 1995-96 school year in this litigation, petitioners here, consistent with their past briefs, assail the entirety of Joshua W.'s educational experience in the District.[1] App. D at 27a, n.8; App. A at 7a. Such protestations are not only irrelevant but ignore the fact that all prior IEPs,

[1] The term "District" as used herein refers to U.S.D. 259.

except for two, were made and implemented by consent. Even on the two occasions prior to this case where a due process challenge was filed, the claims were later withdrawn and those IEPs were also implemented by consent. U.S.D. 259 Supp. App. at 57-66.[2]

In November, 1994, when Joshua W. was 16, District educators duly convened an IEP team to develop Joshua W.'s IEP for the 1994-95 school year. Identifying Joshua W. as having a behavior disorder, the IEP called for placement in a special day school, which was also implemented with parental consent. In accordance with the placement, Joshua W. was transferred to Sowers Alternative School on or about November 19, 1994. After arriving at Sowers, Joshua W. was, on separate occasions, intermittently confined as a juvenile offender at the Sedgwick County Youth Residence Hall ("YRH") where he continued to receive services from the District while confined. App. D at 23a.

On January 27, 1995, Joshua W. exited YRH and never returned to Sowers. He quit attending classes in the District's schools altogether and never returned to attend classes in the District. Following his departure from the District's schools, Joshua W. inhabited a number of locations, in-state and out-of-state, under the control of his mother, Anita O. Beginning in February, 1995, shortly after he left the District, he was institutionally confined at juvenile facilities in Larned, Kansas, for approximately

---

[2] This citation refers to the Supplemental Appendix filed by this respondent in the Court of Appeals. Later citations to "Aplts' App." refer to Appellants' Appendix in the Tenth Circuit.

six months. In July, 1995, he spent a brief period of time in Charter Hospital in Wichita for substance abuse treatment followed by attendance at Shadow Mountain, a private residential facility in Tulsa, Oklahoma, where he received similar treatment for substance abuse. *Id.*

During this period following his departure from District schools, both his father and mother moved outside the boundaries of U.S.D. 259 and established residency elsewhere. On March 1, 1995, Mrs. O. moved to a new home which, though bearing a Wichita, Kansas address, she knew to be located within the Andover School District (U.S.D. 385). Likewise, in April, 1995, Joshua W.'s father moved approximately 50 miles outside the District. *Id.* at 24a.

On September 1, 1995, while en route by car to a military school in Salina, Kansas, Joshua W. threatened Mrs. O. with a knife, resulting in a charge of felony aggravated assault, in which he was prosecuted as an adult. Remaining confined in the Saline County Jail, Joshua W. entered a guilty plea to the charge on September 22, 1995, and sentencing was then set for November 20, 1995. As a condition of release before sentencing, the district court directed Joshua W. to proceed directly to attend Kemper Military Academy in Boonville, Missouri, where his mother had effected his enrollment, which he did. Signing an appearance bond on September 25, Joshua W. listed his address as that of his mother's new home. *Id.*; Aplts' App. at 241, 251, 254.

Noticeably absent from the Petition are the following facts regarding Mrs. O.'s subsequent conduct, which both courts below characterized as "manipulative." App. D at

30a; App. A at 11a. An uncontroverted record showed that in the period before sentencing, while Joshua W. was at Kemper, Mrs. O. began a frenzied effort to secure her son's placement at Three Springs Academy, a private residential facility in Centerville, Tennessee, as a condition of probation upon sentencing. Thus, the record shows that sometime prior to November 2, 1995, she contacted Three Springs and on November 4, completed an enrollment application to place Joshua W. in Centerville for the 1995-96 year. On November 6 and 7, she telephoned Three Springs a total of six times to effectuate his enrollment. Confident of his placement there, on November 16, 1995, Mrs. O. purchased two airline tickets for Joshua W. and herself for travel from Kansas City, Missouri to Nashville, Tennessee, which they did not use. As found by the District Court from the uncontroverted record, Mrs. O. had, by this time, "effectively engineered" her son's placement at Three Springs. App. D at 24a-25a, 30a.

Following these efforts, Mrs. O. then initiated contact with the District. On Friday, November 17, 1995, after Joshua W. had been absent from District schools for almost ten months, Mrs. O. contacted the principal at Sowers, where Joshua W. had last attended, advising that she wished to bring her son back into the District's schools. The principal advised her to enroll Joshua W. at Sowers since a special day school was the placement made in his last IEP dated November 18, 1994, and a status conference was arranged for Monday, November 20, 1995 to acquire information about his current situation. *Id.* at 25a.

On the morning of November 20, Mrs. O. met with Mr. Coleman, the principal, and three other members of the Sowers staff, to review Joshua W.'s status and to discuss placement options upon his return. Requesting residential placement in general, Mrs. O. signed two release forms so that staff could obtain some information about Joshua W. and his activities during his prolonged absence from District schools. Consistent with the November 1994 IEP, Mr. Coleman advised that Joshua W. should continue at Sowers in the interim pending the District's accumulation and assessment of the new information concerning Joshua and subsequent development of a new IEP and placement. Specifically, Mr. Coleman advised Mrs. O. of the need to observe Joshua W. in the educational setting and of the need to conduct a possible reevaluation before scheduling an IEP conference and making a final placement decision. Mrs. O. was aware that no placement decision had then been made or could be made until these steps had been completed, testifying that staff had not yet determined what Joshua's needs were. *Id.*; Aplts' App. at 106-07, 110-12, 114-15, 118, 127, 132, 143, 171, 173, and 196. Mrs. O. confirmed her understanding of this fact at the due process hearing:

> Q.: On the 20th wasn't there some discussion that they would need to further evaluate Josh and Josh's situation before they made a final decision on his educational placement?
>
> A.: Yes.
>
> Q.: And, in fact, you signed several forms on that occasion so they could get more information so they could make an evaluation.

A.: Yeah.

Q.: So on that date it was obvious they had not completed the evaluation process?

A.: Oh, definitely. Yeah. Aplts' App. at 132.

The record showed that Mrs. O. made misrepresentations of fact and strategic omissions at the November 20th status conference. Although having already engineered her son's placement at Three Springs, she told District staff that Joshua W. could be picked up for classes the next day at 144 S. Sheridan in Wichita, the apparent dwelling of his 20 year old sister, although he was then at Kemper. Though aware she had lived in the Andover District for over eight months, she did not mention this fact to District staff. Discussing residential placement only in general, she never advised District educators of her decision, previously made, to place her son at Three Springs. App. D at 25a. Asked why she reinitiated contact with the District when she had no intent to reintroduce him in District schools and obtain local educational services, she testified that it was simply an attempt to force U.S.D. 259 to pay for the costs of Three Springs:

Q.: Going back a little bit, so I can get this right in my mind, as of November 20th, 1995, you pretty much settled on Three Springs as a place for Joshua to go; correct?

A.: If I could find a way to do it, yes.

Q.: What do you mean by that?

A.: Well, I wanted the district to pay for it. Aplts' App. at 184.

Also unknown to Sowers staff, because not disclosed by Mrs. O. at the meeting, was the fact that Joshua W.

was scheduled for sentencing later that very day in the Saline County District Court (some ninety miles away). At the hearing, the court acknowledged Mrs. O.'s "special arrangements" with Three Springs, as did Mrs. O. herself, and in lieu of 18 months imprisonment, granted Joshua W. probation on the condition that he immediately attend and successfully complete the Tennessee program at his own expense. On November 21st, Mrs. O. and Joshua W. proceeded by plane from Kansas City to Three Springs, using separate tickets from those purchased earlier. App. D at 25a-26a; U.S.D. 259 Supp. App. at 11, 22, 26-32.

Expecting Joshua W. to attend classes the next day as indicated by Mrs. O., District staff called her house and corporate offices in the days following to learn his whereabouts and to attempt to set-up further steps toward a placement decision. Memorializing one such message received on December 1, Mrs. O. noted that the District "wanted to set-up an [sic] meeting with me which they were going to include a mental health representative and try to get some family services for Joshua and possibly some sort of direction toward a long term placement for him." Aplts' App. at 228. These telephone calls went unanswered for three weeks, until, on December 12, 1995, Mrs. O. returned a call from a District social worker advising that she had already placed her son at Three Springs and had initiated due process against U.S.D. 259, not requesting that placement be pursued by the District. On December 4, petitioners' counsel drafted a letter to the District formally requesting a due process hearing. App. D at 26a; U.S.D. 259 Supp. App. at 108-09, 134.

Due to the absence of necessary information and the inability to observe Joshua W. and perform a reevaluation, a new IEP was not developed and no placement decision was made. On January 16, 1996, during a routine review of Joshua W.'s file, the District learned that Mrs. O., his responsible parent, resided in U.S.D. 385, Andover, Kansas. App. D at 26a; Aplts' App. at 104, 106-07, 112, 132, 136, 173, 196, 228.

Joshua W. attended school in Tennessee for approximately one year and in November, 1996, the state district court modified his conditions of probation to order that he successfully complete a program at a private facility in California. However, he left that program without completion after only three months. In January, 1998, Joshua W. was sentenced to a term of 25 months imprisonment in the custody of the Kansas Department of Corrections on new charges of felony aggravated assault and possession of a controlled substance. App. D at 26a-27a.

Based on this record of uncontroverted facts, both courts below entered judgment in favor of the U.S.D. 259 defendants for the separate and independent reasons that: (1) petitioners had presented no proof to demonstrate that Joshua W. was a resident of U.S.D. 259 when Anita O. contacted the District; (2) petitioner Anita O. forfeited any right to reimbursement by her inequitable conduct which obstructed the IEP process and prevented the District from making a final placement decision. Reviewing the evidence on the state law residency issue, the District Court held "that Joshua was not entitled to educational services from the District since he was neither living in or physically present in the district in November 1995, and was not living with a parent or

person acting as a parent in the District." App. D at 28a. The Court found that both parents had moved out of the District and that there was no showing that his sister was in charge of his care and support. *Id.* at 28a-29a. The Court concluded that "the uncontroverted facts establish that, by the time of the attempt, or more accurately, the pretended attempt to enroll Joshua in November of 1995, he cannot be considered a resident of the Wichita school district." *Id.* at 29a.

Finding from the record that Mrs. O.'s conduct was "manipulat[ive]" and not "sincere", the District Court entered judgment against petitioners for the separate reason that Mrs. O.'s inequitable conduct forfeited any claim to reimbursement under the IDEA. *Id.* at 30a. Finding that Mrs. O. had "effectively engineered" a predetermined private placement before contacting the District and finding that she had engaged in misrepresentation and concealment, the Court concluded that "Anita O.'s actions were not prompted by a sincere effort to obtain a final decision from the District regarding placement, but were simply seeking to manipulate the District into funding a placement upon which she had already resolved." *Id.* (footnote omitted). The Court found that such actions "effectively frustrated the evaluation and review of Joshua's placement." *Id.* at 32a. The Court of Appeals affirmed on both grounds, concluding that "the record confirms the district court's residency determination as well as its conclusions that Anita O.'s action in unilaterally placing Joshua W. in Three Springs was manipulative, was not undertaken for education purposes, and essentially obstructed the IDEA process." App. A at 11a.

REASONS FOR DENYING THE WRIT

I. PETITIONERS' FAILURE TO PROVE RESIDENCY UNDER STATE LAW PRESENTS NO SUBSTANTIAL FEDERAL QUESTION.

Although purporting to raise a federal constitutional issue regarding the Kansas school residency statute, the Petition in fact presents nothing more than petitioners' disagreement with lower court findings of fact that Joshua W. was not a resident of U.S.D. 259 as defined by state law. Only rhetorically alleging a conflict, the Petition identifies no particularized or intolerable conflict between the Court of Appeals' construction of Kansas law and any controlling decision of this Court or parallel decisions of other Courts of Appeals. Moreover, petitioners' failure to present the alleged constitutional issue to the courts below is a bar to its consideration for the first time in this Court. For these reasons, question one presented by the Petition provides no basis for certiorari, and the writ should be denied.

Alternatively faulting either the Kansas statute or, implicitly, the findings of the lower courts, the Petition ignores a controlling point fatal to their request for review: petitioners simply failed to carry their burden to demonstrate that Joshua W. was a resident of U.S.D. 259.[3]

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[3] Petitioners expressly admitted in their Amended Complaint that Joshua W. never lived with his mother in the Andover District, leading the courts below to conclude that he was not a resident of that District under state law. App. F at 42a; App. A at 8a-9a. Petitioners failed to controvert the facts stated by respondent Tompkins, resulting in dismissal of their claim against him, and failed to properly appeal the dismissal of their

Containing no definition of residency, the IDEA, 20 U.S.C. §§ 1400 *et seq.*, follows the various laws of the individual states regarding who is a resident of a school district entitled to services under the Act. *Wise v. Ohio Dept. of Educ.*, 80 F.3d 177, 182 (6th Cir. 1996); *Susan R.M. v. Northeast Indep. Sch. Dist.*, 818 F.2d 455, 458 (5th Cir. 1987). Here, controlling Kansas law, as set forth in Kan. Stat. Ann. § 72-1046(a), defined residency for school purposes as follows:

> "Any child who has attained the age of eligibility for school attendance may attend school in the district in which the child lives if (1) the child lives with a resident of the district and the resident is the parent, or a person acting as parent, of the child; * * * "

The terms "parent" or "person acting as parent" are defined in subsection (d):

> "(1) 'Parent' means and includes natural parents, adoptive parents, stepparents, and foster parents;
>
> (2) 'person acting as parent' means (A) a guardian or conservator, or (B) a person, other than a parent, who is liable by law to maintain, care for, or support the child, or who has actual care and control of the child and is contributing the major portion of the cost of support of the child, or who has actual care and control of the child with the written consent of a person who has legal custody of the child, or who has been

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claim against the Kansas State Board of Education. App. D at 31a-32a; App. A at 11a-12a.

> granted custody of the child by a court of competent jurisdiction; and, * * * ."

Thus, a minor student in Kansas establishes residency by showing that he lives within the school district from which he seeks services with a custodial parent or with a person acting as parent who is a resident of that district. Although providing for other possibilities, Kansas law primarily anchors the residence of a minor student to that of his parents, grounded upon the fact that a child's parents have the duty to provide for the care and support of the child and are in control of his affairs, particularly including his education. In keeping with this principle, Mrs. O. made it plain that she provided all of his financial support and was in charge of his affairs, particularly including his education. App. D at 29a.

The Court of Appeals properly affirmed the District Court's finding that petitioners failed to show that Joshua W. lived within U.S.D. 259 with a custodial parent or person acting as a parent. At the time Mrs. O. made the "pretended attempt" to enroll her son in November, 1995, it is uncontroverted that neither she, nor Joshua W.'s father, were residents of U.S.D. 259, both having moved months before, and thus, Joshua W. did not live within the District with a custodial parent. App. D at 24a, 28a-29a. Equally clearly, there was no proof that Joshua W. lived within the District with a person to whom his care had been formally delegated. There was no proof that Joshua W. ever inhabited his former Wichita address at anytime after August, 1995, it being uncontroverted that he was, respectively, in jail, and at Kemper, in the fall of 1995, never returning to the former address. Moreover, the record showed that Mrs. O. never delegated care of

Joshua W. to his sister, whether in writing, as required by statute, or in practical effect, at anytime, nor was his sister shown in any manner to contribute to his support or be in charge of decisions regarding his education. *Id.* It was Mrs. O. and Mrs. O. alone that was in charge of Joshua W.'s affairs and at the time she approached the District, Joshua W. did not even live within the District, much less reside there with an adult to whom his care had been delegated.

Attempting to mask their failure of proof under state law, petitioners disingenuously assail the result by likening Joshua W. to an IDEA student who, unable to receive FAPE from his home district, nevertheless remains a resident while away from home at school. But this is not such a case. Joshua W., a minor in November, 1995, was found to be a nonresident because he neither had a parental anchor in the District nor residency therein with any other adult to whom his care had been delegated, not because he merely attended school out of the District. A mere subjective desire, without tangible habitation or parental anchor in the District, did not render him a resident of U.S.D. 259.

At bottom, the Petition presents merely petitioners' disagreement with the District Court's adverse finding of fact that Joshua W. failed to prove his residency under Kansas law. This fact-bound determination of state law presents no important or recurring federal question meriting the exercise of this Court's discretionary jurisdiction. Glaringly absent from the Petition is any demonstration of an intolerable conflict between the decision below and any decision of this Court or of other Courts of Appeals, and the Petition should be denied.

Petitioners' after-the-fact challenge to the constitutionality of the statute, alleging that it erects a conclusive presumption against residency, is similarly lacking. Significantly, petitioners failed to raise this issue at anytime in the lower courts, and the issue cannot be presented for initial consideration now. *E.E.O.C. v. Fed'l Labor Relations Auth.*, 476 U.S. 19, 24 (1986). Moreover, on its face, the Kansas statute permits a broad variety of circumstances in which school district residency may be established and erects no irrebuttable presumption or wall against evidentiary proof as condemned in *Vlandis v. Kline*, 412 U.S. 441 (1973). Petitioners simply failed to establish their residency as defined by state law. That failure lies with petitioners, and not with the Kansas statute. The Petition for Certiorari should be denied.

II. THE COURT OF APPEALS' CONCLUSION THAT PARENTS WHO OBSTRUCT THE IEP PROCESS ARE NOT ENTITLED TO REIMBURSEMENT FOR A UNILATERAL PRIVATE PLACEMENT WAS UNQUESTIONABLY CORRECT AND PRESENTS NO ISSUE MERITING REVIEW.

Unchallenged findings of fact demonstrating parental obstruction and manipulation of the IEP process stand as an independent ground for denial of the writ. The decision below is but one of a consistent line of cases in the Courts of Appeals refusing to award equitable reimbursement to parents whose conduct prevents a school district from having a full and fair opportunity to make a final placement decision under the IDEA. Unable to demonstrate error in the Court's findings, which are based on uncontroverted facts derived in large part from Mrs. O.'s

own admissions, petitioners simply ignore them, employing accusations in lieu of record facts. For this separate reason, the writ should be denied.

In enacting the IDEA, Congress envisioned that adherence to proper procedures by parents and educators alike would normatively result in informed placement decisions for disabled children. *Board of Educ. v. Rowley*, 458 U.S. 176, 206 (1982). The IDEA establishes an elaborate and structured system for the identification, evaluation, and placement of disabled children and contemplates that cooperative efforts, exchange of information, and fair dealing among parents and educators will lead to substantively appropriate decisions. App. D at 29a ("The purpose of the IDEA is to ensure that the local educational agency and the parents work collectively in finding an appropriate placement for their child.") (citation and internal quotation marks omitted). *See also Schoenfeld v. Parkway Sch. Dist.*, 138 F.3d 379, 381 (8th Cir. 1998) (an IEP "must be developed through the cooperation of school officials and parents"). En route to conducting an evaluation of a child and reaching a final placement decision, local educators are entitled to rely on their own observations, data, and personnel. *Dubois v. Conn. State Board of Educ.*, 727 F.2d 44, 48 (2nd Cir. 1984). Parents dissatisfied with the final placement decision are entitled to initiate due process proceedings after "a decision is made [by the LEA] proposing or refusing to initiate or change the identification, evaluation, or placement of the child." *Clay T. v. Walton County Sch. Dist.*, 952 F. Supp. 817, 824 (M.D. Ga. 1997). *See also Murray v. Montrose County Sch. Dist.*, 51 F.3d 921, 925 (10th Cir.)

("school district decision" may be challenged in due process hearing), *cert. denied*, 516 U.S. 909 (1995). The requirement of finality is implicit in this Court's decision in *Sch. Comm. of Burlington v. Dept. of Educ.*, 471 U.S. 359 (1985), where the Court held that parents who unilaterally place their child in a private school pending IDEA review proceedings may obtain reimbursement if they show that the district's IEP placement was inappropriate and their own appropriate. *See also Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7, 16 (1993) (same; recognizing that IDEA remedies are governed by "equitable considerations").

Here, an uncontroverted record demonstrates, consistent with the findings of both courts below, that Mrs. O.'s "manipulative" conduct "essentially obstructed the IDEA process", depriving District educators of a fair opportunity to make a final placement decision. App. A at 11a; App. D at 30a, 32a. Tellingly, the record shows that Mrs. O. had already "effectively engineered" her son's private placement at Three Springs before she contacted U.S.D. 259 staff. App. D at 30a. Once contacting District officials, she engaged in misrepresentation and calculated omission rather than engaging in a forthright and cooperative exchange of information to enable the District to properly evaluate her request. Thus, although knowingly residing within the Andover District, she did not mention this fact; although having already secured her son's placement in Tennessee, she did not disclose her efforts or even mention Three Springs at all; aware of court proceedings involving her son later that very day, she did not disclose his conduct or status; and knowing her plans to leave immediately for Tennessee, falsely told District

educators that her son could be picked up for school in Wichita the next day. *See* Respondent's Brief In Opposition at pp. 6-7.

Following her disingenuous "consultation" with the District, Mrs. O. then took Joshua W. to her predetermined placement the next day, depriving District educators of any opportunity to evaluate him and develop an informed placement decision. Since her son had been absent for almost ten months, Mrs. O. was aware that the District wished to personally observe him in the classroom setting at Sowers and would most likely reevaluate him before determining final placement. She admitted that the District did not refuse residential placement on November 20; that she knew further review and proceedings by the District were necessary; and that no final placement decision had been made when she removed him to the distant placement in Tennessee. App. D at 25a, 30a. *See also* Aplts' App. at 274, Plaintiffs' Amended Complaint, ¶ 29 (admitting that no final placement decision had been made when Joshua W. was removed and due process commenced). Mrs. O.'s conduct is the antithesis of the good faith predicate required for equitable reimbursement under *Burlington*.[4]

The Court of Appeals' decision is but one in an unbroken line of cases denying reimbursement to parents whose inequitable conduct prevents local educators from having a fair opportunity to make a final placement decision. Thus, the Courts of Appeals have consistently held

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[4] The Petition notably fails to mention or confront these uncontroverted facts.

that where parents unilaterally remove their child to a private placement and commence due process before any final placement decision has been made by school officials, parents forfeit any right to equitable reimbursement under the IDEA. *Schoenfeld v. Parkway Sch. Dist.*, 138 F.3d 379, 381-82 (8th Cir. 1998) ("Parkway had no opportunity to provide an appropriate education for Scott in the public school as is preferred under IDEA because he transferred to private school after only one day in eighth grade without any discussion with Parkway officials about possible accommodations to meet his current needs * * * Since Parkway was denied an opportunity to formulate a plan to meet Scott's needs, it cannot be shown that it had an inadequate plan under IDEA. Reimbursement for the costs of his private placement would therefore be inappropriate because school officials were excluded from the decision, and [ ] because no showing of inadequate services under IDEA can be made.") (citations omitted); *Patricia P. v. Board of Educ.*, 203 F.3d 462, 468-69 (7th Cir. 2000) (quoting *Schoenfeld*, Court "hold[s] that parents who, because of their failure to cooperate, do not allow a school district a reasonable opportunity to evaluate their disabled child, forfeit their claim for reimbursement for a unilateral private placement."); *Tucker v. Calloway County Board of Educ.*, 136 F.3d 495, 503-05 (6th Cir. 1998) (same); *Wise v. Ohio Dept. of Educ.*, 80 F.3d 177, 184-85 (6th Cir. 1996) (same). Like these cases, the Tenth Circuit's decision accords with the equitable principles of the IDEA and with the decision in *Burlington*, barring reimbursement where the parents' inequitable conduct deprives school officials of the opportunity to make a final placement decision. Based upon an unchallenged factual

record showing parental deception and manipulation, the decision of the Court of Appeals denying reimbursement is even more compellingly correct than the cited cases. The District cannot be compelled to pay for the costs of a placement in which it had no opportunity to participate.

Beyond the substantive correctness of the Court's decision and its uniformity with other decisions, another important factor warrants a denial of the writ here. The issue addressed by the Court of Appeals is unlikely to recur, and if it should, will arise under a different legal framework. The decision in this case, like those cited above, all arise under the former version of the IDEA before its recodification in 1997. The amended IDEA has a specific provision requiring parents to provide ten days notice to school officials of their intent to unilaterally remove their child from the public schools in order to allow educators an informed opportunity to address parental concerns. 20 U.S.C. §§ 1412(a)(10)(C)(ii) & (iii). Therefore, review of the Court of Appeals' decision will not provide guidance on an issue likely to recur in the future, as new cases, if any, will arise under the amended IDEA.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit should be denied.

Respectfully submitted,

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